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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ITEL CONTAINERS INTERNATIONAL CORP.;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

VS.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

Under 46 U.S.C. § 971, have container lessors "furnished" containers to a vessel, so as to create a maritime lien for container charges, if the containers were used aboard that vessel, although the containers were not limited to use exclusively aboard that particular vessel?

LIST OF PARTIES

Petitioners—Container Lessors

A. Itel Containers International Corp.

B. Genstar Container Corp.

C. Flexi-Van Leasing, Inc.

D. Interpool Limited

E. Transamerica ICS Inc.

F. Nautilus Leasing Services, Inc.

All Petitioners are corporations. Pursuant to Supreme Court Rule 28.1, the parent companies, subsidiaries, and affiliates of each Petitioner are listed in Appendix A.

Respondents

A. M/V *C.C. San Francisco—In rem*

B. Char Yigh Marine (Panama) S.A.—Claimant on behalf of M/V *C.C. San Francisco*

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CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit, issued in this proceeding on January 20, 1987 (as amended February 5, 1987).

OPINIONS BELOW

1. The opinion of the Ninth Circuit Court of Appeals is reported *sub nom. Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.*, 808 F.2d 697 (9th Cir. 1987) and is attached as Appendix B hereto. The Order of the Ninth Circuit Court of Appeals denying the petition for rehearing, filed April 23, 1986, ordered not for publication, is attached as Appendix C hereto.

2. The opinion of the United States District Court for the Central District of California is reported *sub nom. Flexivan Leasing, Inc. v. M/V C.C. San Francisco*, 628 F. Supp. 1077 (C.D. Cal. 1987) and is attached as Appendix D hereto.

JURISDICTION

Invoking federal admiralty jurisdiction under 46 U.S.C. § 1333(1), Petitioners asserted maritime liens against Respondent vessel *C.C. San Francisco* in the United States District Court for the Central District of California. On August 23, 1985, the District Court granted Petitioners' motions for summary adjudication establishing their right to maritime liens.

Respondents appealed to the United States Court of Appeals for the Ninth Circuit. On January 20, 1987, the Ninth Circuit (Judges Goodwin and Wallace in the majority, and Judge Anderson dissenting) reversed the District Court and denied Petitioners' right to the liens. On February 13, 1987, Petitioners requested a rehearing or rehearing *en banc*. On April 23, 1987, the Ninth Circuit denied Petitioners' request for rehearing or rehearing *en banc*.

This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

STATUTE IN ISSUE

The statute in issue, 46 U.S.C. § 971, the "Lien Act", reads:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

STATEMENT OF THE CASE

These are consolidated cases filed by Petitioners ("Container Lessors") against the vessel *CC San Francisco* (the "Vessel"). An ocean carrier called "CC Line" or "Char Ching Line" chartered and operated a fleet of six ships in the trans-Pacific container service between ports in the Far East and the United States. One of those ships was the *CC San Francisco.* The Vessel was specially designed for carrying cargo in containers, and during her service with CC Line carried only containerized cargo.

Each Container Lessor separately leased cargo containers to CC Line. The containers were delivered to CC Line at different times in a variety of locations. The containers are substantially uniform in design and construction (of 20 foot and 40 foot lengths), are essentially interchangeable, and are designed for use in intermodal transportation related to ocean carriage. Once CC Line took delivery of the containers, CC Line (in accordance with normal container shipping practice) had authority to use the containers aboard any of the vessels operating in its trans-Pacific service, and in related shoreside transport. One or more of each Container Lessor's containers was actually used aboard the Vessel for the transport of ocean cargo.

CC Line failed to pay container hire and other charges for use of the containers. Each of the Container Lessors instituted suit and asserted maritime liens against the Vessel to collect the charges owed in connection with containers actually used aboard the Vessel. Char Yigh Marine (Panama) S.A. appeared in the actions as the Vessel's owner and challenged the right of the Container Lessors to assert maritime liens against the Vessel.

The District Court concluded upon cross motions for summary adjudication that Container Lessors were entitled to maritime liens against the Vessel for charges relating to containers carried on the Vessel. Char Yigh appealed. In an opinion filed January 20, 1987, the Ninth Circuit (Judges Goodwin and Wallace in the majority, and Judge Anderson dissenting) reversed the District Court and denied the liens on the ground that the containers were not "furnished" to the Vessel within the meaning of 46 U.S.C.

§ 971, notwithstanding that the Ninth Circuit found the containers to be "necessaries" within the meaning of the statute.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

International trade depends upon ocean shipping. Ocean shipping is primarily accomplished today by loading goods into intermodal cargo containers, which are then loaded onto ships and taken to ports throughout the world.

The effect of the "container revolution" on international trade has been rapid and dramatic. See generally, Quinn, "*Ocean Container Leasing and Maritime Liens: An Example of Flexibility in U.S. General Maritime Law,*" 18 J. Mar. L. & Com. 1, at pp. 2-8 (1987). As stated in Simon, "*The Law of Shipping Containers,*" 5 J. Mar. L. & Com. 507, 507 (1974):

> "One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the advent of the 'container revolution.' This radically novel concept of transferring, handling, stowing, discharging and delivering hundreds of packages simultaneously and mechanically by means of large reusable permanent metal containers, container ships, special container handling equipment and container terminals is so efficient a labor saving device that it has already, to a large extent, altered conventional methods of shipping large numbers of packages individually."

Because of the overwhelming economic advantages of containerized transport, what was "radically novel" in 1974 now dominates international shipping. By 1979, more than 60% of the world's ocean commerce had been containerized, and in 1983 there were almost 46 million TEU (twenty foot equivalent unit) container movements. Quinn, *id.* at 4. By 1985 that had increased to 55 million TEU container movements. *Containerization International Yearbook*, 1987 (at p.7).

Container lessors have played an integral part in this development:

> "Standardization of containers, growth in international demand for intermodal equipment, and the lack of geographic balance and worldwide trade led directly to the emergence of container lessors to provide necessary equipment to ocean carriers. Lessors are able to provide equipment when and where needed, and leasing equipment frees the ocean carrier from a significant capital investment. Satistics show that by the late 1970's, approximately one-half of the marine containers and chassis in use throughout the world were leased from lessors rather than owned by the steamship operators . . . By 1982, more than 80 percent of American containers were leased, and less than 20 percent were carrier owned." (Quinn, *id.* at 7-8.)

This Petition concerns an issue critical to the ocean shipping industry in general and to the container leasing industry in particular: whether container lessors will continue to have maritime liens on vessels for container charges when their leased containers are used aboard those vessels. Although recognizing that containers are "necessary" for containerized shipping operations, the Ninth Circuit denied the liens on the ground that each container had not been designated for use exclusively on the *C.C. San Francisco* when each container was leased out. The Ninth Circuit opinion, however, primarily relied upon an incorrect reading of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L. Ed. 97 (1920) and upon an incorrect reading of the Lien Act itself. Further, the Ninth Circuit's construction of the Lien Act directly conflicts with decisions and principles enunciated by courts in other circuits, in particular the recent *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Equilease Corporation v. M/V Sampson*, 793 F. 2d 598 (5th Cir., 1986), cert. den. ____ U.S. ____, 93 L.Ed 2d 575, 107 S.Ct 570 (1986). This is especially significant in view of the paramount policy for national uniformity in the application of federal maritime law.

If allowed to stand, the Ninth Circuit opinion would deny to container lessors their most important (and often their only practical) security in leasing their containers, which are carried by their lessee ship operators to the four corners of the globe.

Furthermore, the split among the Circuits places vessel owners and container lessors alike in a state of confusion, their lien rights depending upon the fortuity of the vessel calling at a port within the jurisdiction of a court favorable to their position on this issue.

I

THE NINTH CIRCUIT MISCONSTRUED SUPREME COURT PRECEDENT AND THE LIEN ACT IN INTERPRETING THE "FURNISHING" REQUIREMENT OF 46 U.S.C. § 971

The issue in this case is the proper construction of the words "[any] person furnishing . . . necessaries . . . to any vessel . . . " in 46 U.S.C. § 971. When leased out, the containers were not contractually allocated for use only on the *C.C. San Francisco,* although they were in fact used aboard that Vessel at identifiable times on identifiable voyages. If "furnishing . . . to any vessel" in § 971 requires the Container Lessors to have allocated and limited each container for use on the *C.C. San Francisco* only, the Container Lessors have no lien. Container lessors submit that the Ninth Circuit misconstrued the "furnishing" requirement of § 971 to require such allocation and limitation.

A. The Ninth Circuit Misconstrued the Piedmont Case to Require Allocation in Order to Satisfy the "Furnishing" Requirement of § 971.

The Majority Opinion in the Ninth Circuit, over a strong dissent, and although acknowledging this to be a close question, narrowly construed "furnishing" under § 971 to require allocation of each container for exclusive use aboard one vessel. In coming to this admittedly "restrictive interpretation" of "furnishing" (808 F.2d at 701), the Majority Opinion relied almost entirely upon *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L. Ed. 97 (1920). However, the facts of the *Piedmont* case are such that the holding does not reach the issue of allocation, and the Majority Opinion below erred in reading *Piedmont* as if it did.

In *Piedmont* a coal supplier (the lien claimant) delivered coal to a company for use both in its shoreside factories and on its fishing boats. The company commingled the coal with its general shoreside stockpile, and then supplied the boats from that stockpile. No determination was made of how much of the supplier's coal was used by the factories and how much by the boats (let alone by any particular boat). The company failed to pay for the supplier's coal. The supplier then asserted a lien on the boats for the unpaid amounts. The Supreme Court denied the lien.

The holding in *Piedmont* did not decide the issue presented in this case. In *Piedmont* the supplier simply could not prove that *any* of its coal was used by *any* particular ship or by any of the ships at all. The supplier had no lien even if allocation were *not* required, for the supplier could not prove that any of its coal had been used on any particular vessel. All of the coal may have been used for strictly non-maritime purposes.

In contrast, it is undisputed that in this case Container Lessors can prove exactly which of their containers were aboard the *CC San Francisco* on any given voyage—manifests and similar records list the containers the Vessel carried. Thus—unlike in *Piedmont*—the Court in this case must decide whether allocation to one particular vessel is a prerequisite for a lien. *Piedmont* is factually distinguishable from this case, and the Majority Opinion below erred in reading *Piedmont* as having held dispositively on the issue whether allocation is required.

Since the Supreme Court in *Piedmont* did not have to reach the issue of allocation, the Majority Opinion below was predicated upon dicta, not the holding of the case. The dicta of the *Piedmont* decision is, however, inconclusive on this point. A leading maritime text, Gilmore and Black, *The Law of Admiralty*, (2d Ed. 1975), § 9-36, p. 661, had this to say about the *Piedmont* decision:

> "As was his habit, Justice Brandeis in the course of a moderately long opinion multiplied the facts that might be considered significant . . . By the time he had finished, not even the purest legal genius could have declared which of these multiple facts, or which combination of them, had

> resulted in the denial of lien. Consequently the case, in its specific context of supplies furnished to a fleet of ships, has ever since proved a slippery precedent to the counsel and lower court judges who have wrestled with it. The Piedmont case is all things to all men and is regularly cited on both sides on every case in which it is relevant . . ."

Indeed, the confusing nature of the dicta in *Piedmont* is illustrated by the fact that both the Majority Opinion and the Dissenting Opinion below rely upon it. The Dissenting Opinion (at 808 F.2d 704) cited the following language in *Piedmont* in support of the position of Container Lessors:

> "Likewise, the fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract [citations omitted], each vessel so receiving supplies may be made liable for the supplies furnished to it." (254 U.S. at 10-11, 41 S.Ct. at 4, 65 L.Ed. at 101.)

Container Lessors acknowledge that *Piedmont* also contains dicta that can be read to imply that allocation to particular vessels is necessary. The Majority Opinion below, however, distorted and misapplied the language in *Piedmont,* basing its restrictive reading of § 971 on the remark in *Piedmont* that maritime liens are *stricti juris.* (808 F.2d at 702.) That remark in *Piedmont* was included in the context of a general discussion of the nature of maritime liens. (*Piedmont, supra,* 254 U.S. at 12-13, 41 S.Ct. at 4, 65 L.Ed. at 102.) The *stricti juris* principle of statutory construction, however, applies only to the creation of new liens, not to consideration of the application of established liens, like those for "necessaries" (which the Majority Opinion below found the containers to be):

> "It is abundantly clear that new types of maritime liens may not be created; however, it appears equally clear that the doctrine of *stricti juris* does not affect the mechanics of the imposition of traditionally recognized varieties of maritime

liens. Provision of necessaries for a vessel is a long recognized basis for a lien . . ." *Atlantic & Gulf Stevedores v. M/V Grand Loyalty,* 608 F.2d 197, 201 (5th Cir. 1979).

Thus the Majority Opinion below misconstrued the *Piedmont* decision in significant respects.

B. The Language of the Lien Act Does Not Mandate Allocation to Satisfy the "Furnishing" Requirement

Aside from the *Piedmont* case, the Majority Opinion below relied upon the language of § 971. Nothing in the language of § 971, however, requires allocation to satisfy the "furnishing" requirement. The Majority Opinion below inferred that Congress, by the use of the "active" voice in the phrase " . . . person furnishing . . . necessaries . . . to any vessel . . . " expressed an intent that a maritime lien requires "active forethought or advance identification of particular vessels." (808 F.2d at 701.) Container Lessors submit that such an inference is unjustified. There is no legislative history to support the inference. Even if the statute could be read to require "active forethought" with regard to the "furnishing" issue, nothing in the statute suggests that "active forethought" translates into "advance identification of particular containers to particular vessels." Container Lessors submit that the Dissenting Opinion is correct in stating:

> " . . . The active and not passive language used in the statute is not a distinction which supports the inference that Congress intended a restrictive reading when viewed against the purposes of the Act . . .
>
> "The purpose behind the Act, as amended in 1971, was as a matter of equity to protect suppliers who in good faith furnish necessaries to a vessel . . . If the purpose of the Act is to be fulfilled, the contruction of the 'furnishing . . . to any vessel' requirement should not be a restrictive one. The majority's restrictive interpretation is contrary to the purpose Congress expressed when it amended the Act. In this, the majority places reliance for its holding upon the fact that the verb "to furnish" is active and not passive. I find this distinction to be of little weight. While use of the active voice may create an inference of Congressional intent, such an

inference should be decidedly subordinate to Congress' stated purpose. [Citation omitted.]" (808 F.2d at 703-4.)

II

THE NINTH CIRCUIT'S INTERPRETATION OF THE "FURNISHING" REQUIREMENT OF 46 U.S.C. § 971 CONFLICTS WITH THE INTERPRETATION OF THAT STATUE BY OTHER CIRCUITS

The Majority Opinion below applied a narrow, outdated view of maritime lien law that conflicts both substantively and in approach with the decisions of courts in other Circuits. This is particularly significant in view of the paramount policy for national uniformity in the application of federal maritime law. *See, e.g., St. Hilaire Moye v. Henderson*, 496 F.2d 973, 980 (8th Cir. 1974), cert. den. 419 U.S. 884, 42 L.Ed 2d 125, 95 S.Ct 151 (1974).

Whether the Lien Act requires allocation of necessaries to one particular vessel is strictly a question of proper construction of the Act, namely whether to construe the "furnishing" requirement narrowly or to interpret it practically and in accordance with modern shipping practices. In contrast to the Majority Opinion below, modern courts have consistently applied a practical construction to the "furnishing" requirement.

Before the decision of the District Court in this case, two other District Courts recently decided the precise issue in this case in favor of container lessors: *Nautilus Leasing Services, Inc. v. M/V Cosmos,* 1983 A.M.C. 1483 (S.D.N.Y. 1983); *Transamerica ICS, Inc. v. M/V Panatlantic*, 1984 A.M.C. 489 (S.D. Fla. 1983). In each case the District Court recognized the maritime lien of container lessors for unpaid container charges without requiring allocation of leased containers to a particular vessel. The District Court in the *Transamerica* case specifically considered this point:

> "Furthermore, for purposes of creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container be delivered directly to the vessel, be sold rather than leased, *or be earmarked for a particular vessel.*" [Emphasis added.] 1984 A.M.C. at 490.

Additionally, the proper approach to construing "furnishing" in § 971 of the Lien Act was analyzed in detail by the Fifth Circuit *en banc* in its recent decision in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986), cert. den. ____ U.S. ____ 93 L.Ed 2d 575, 107 S.Ct 570 (1986). In that case the issue was whether insurance was "furnished" to a vessel and was a "necessary" such that the insurer could claim a maritime lien on the vessel for the unpaid insurance premium. The Fifth Circuit unanimously agreed that the insurance was "furnished" to the vessel and that the "furnishing" requirement should be construed in a practical manner, rather than narrowly or technically. The Court stated:

> "Equilease argues that the concept of 'furnishing' requires a physical delivery to the vessel. Equilease's heavy reliance on a literal interpretation of the word 'furnishing,' however, is misplaced. To read 'furnishing' as requiring an actual thing to be physically delivered to the vessel would foreclose any intangible services from ever being held necessaries under section 971 . . .
>
> * * *
>
> "We find no persuasive reason to read the term 'furnishing' so narrowly as Equilease would urge. The [Lien Act] was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation. We hold that 'furnishing' in section 971 does not necessarily require an actual delivery of something to the vessel." (793 F.2d at 603.)

The *Equilease* approach to the proper construction of the Lien Act—practical, not restrictive—is the consistent modern view. Modern courts construing the language of § 971, especially after the 1971 Amendment to the Act, have essentially abandoned the former restrictive attitude toward construction of that section. In addition to the cases cited above, a multitude of courts in recent years have broadly construed the Lien Act and have recognized liens unimagined seventy years ago. For example, such expenses as printing and advertising (which are obviously not physically delivered to the vessel by the supplier) now may give rise to a

maritime lien. *Colonial Press of Miami, Inc. v. The Allen's Cay,* 277 F.2d 540 (5th Cir. 1960); *Stern, Hays & Lang, Inc. v. M/V Nili,* 407 F.2d 549 (5th Cir. 1969). *See also Payne v. S.S. Tropic Breeze,* 423 F.2d 236, 241 (1st Cir. 1970), cert. den. 400 U.S. 964, 27 L.Ed 2d 383, 91 S.Ct. 363 (1970), which broadly construed the word "necessaries" in § 971 and stated: "We think that a broad interpretation is more consistent with the purpose of the Act than the earlier, narrow approach."

If allowed to stand, the Majority Opinion below will lead to inconsistent application of maritime lien law depending upon the port in which a container vessel happens to dock. A container lessor may be unable to enforce a claimed maritime lien against a vessel calling at Los Angeles, but may be able to enforce the claimed lien against that same vessel if it calls, for instance, at New Orleans. This anomaly requires resolution by this Court.

III

THE SUPREME COURT SHOULD REEVALUATE, UPDATE, AND CLARIFY THE *PIEDMONT* DECISION IN VIEW OF THE STATUTORY, CASE LAW, AND ECONOMIC CHANGES SINCE THE PIEDMONT CASE WAS DECIDED

Since *Piedmont* was decided in 1920 the Lien Act has been amended twice to broaden the protections of suppliers of necessaries. As described above, modern courts have construed the Lien Act in a practical, not restrictive, manner to effect Congress's purposes in amending the statute. And an economic revolution in shipping has recently occurred. For these reasons the Supreme Court should take this opportunity to reevaluate, update, and clarify the *Piedmont* decision as it may now apply to liens for container charges.

A. Since Piedmont the Lien Act Has Been Twice Amended to Broaden The Protections of Suppliers, Which Has Changed the Basis Upon Which Piedmont Was Decided

The *Piedmont* case was decided under the 1910 version of the Lien Act. Since 1910 Congress has amended the Lien Act twice, in 1920 and again in 1971. Each time the purpose of the amendment was to make it easier and more certain for suppliers

of necessaries to protect their interests by making maritime liens available to them. In 1920 Congress amended the Lien Act to expand the scope of "necessaries". *See* Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975) § 9-34, at p. 657. The 1971 Amendment also significantly broadened suppliers' lien rights. The Ninth Circuit itself recognized the broad modern approach to maritime liens consonant with the 1971 Amendment in *Farwest Steel Corp. v. Barge Sea-Span 241*, 769 F.2d 620, 623 (9th Cir. 1985):

> "Our analysis must proceed under the Lien Act's presumption in favor of materialmen for all repairs, supplies, and other necessaries ordered. [Citations omitted.] This presumption was enhanced in 1971 when Congress deleted the requirement that materialmen inquire about the existence of any no-lien clauses before furnishing supplies to a contractor. *See Atlantic & Gulf Stevedores v. M/V Grand Loyalty*, 608 F.2d 197, 201-2 (5th Cir. 1979) (legislative history of 1971 amendment requires a liberal application of Lien Act); Ray, *Maritime Contract Liens*, 47 Tul.L.Rev. 587, 591 (1973)."

Indeed, the Fifth Circuit has determined that the 1971 Amendment to the Lien Act altered the applicability of the *stricti juris* approach upon which the Majority Opinion below relied.

> "We are of the further opinion that § 971 et seq. is not to be viewed through the constricting glass of *stricti juris*, or as some would suggest, *strictissimi juris*. We view the legislative history of these sections to mandate a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act." *Atlantic & Gulf Stevedores v. M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979).

Given these changes in the Lien Act, it is time for the Supreme Court to reevaluate, update, and clarify the proper interpretation of § 971 of the Act, lest the 1910 version of the Act defeat the subsequent amendments through the application (or misapplication) of the *Piedmont* decision to post-amendment cases.

B. Requiring Allocation Leads To Serious Economic Inefficiencies

The effect of the Majority Opinion below will be detrimental to maritime commerce. To protect their lien rights container lessors would have to limit the use of specific containers to a specific vessel. The efficient use of containers is based upon their interchangeability and the ease of discharging them from the vessel, loading others, and leaving before the discharged containers are unstuffed. The Majority Opinion below would eliminate that economy and require the vessel to wait while its "specified" containers are unstuffed inland, restuffed with new cargo, and reloaded aboard the vessel. The speed of cargo movement would be reduced, and the cost of cargo movement correspondingly would increase. Alternatively, the ship operator would have to lease multiple sets of containers specified for each ship. The interchangeability of containers—their essential efficiency—would be lost. This essential efficiency was described and recognized by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 269-271, 53 L.Ed. 2d 320, 336-7, 97 S.Ct. 2348 (1977).

Further, the Majority Opinion below will limit the availability of leased containers, particularly to smaller companies who cannot afford the capital investment to buy their own containers, because without maritime lien rights container lessors will be more reluctant to lease to them.

The Majority Opinion below in fact recognized that "modern business conditions" call for a broad rather than restrictive reading of the "furnishing" requirement. (808 F.2d at 703.) However, the Majority Opinion below, after quoting the District Court opinion in the *Piedmont* case, which also justified a broad interpretation of "furnishing" in part upon [then] modern business conditions, proceeded to reject that consideration and stated that "like the Supreme Court in *Piedmont*" they were not persuaded that modern business conditions justified a broader reading of § 971. (808 F.2d at 703.) However, the Supreme Court in *Piedmont* did not address the economic effect of its decision. The Majority Opinion below unfairly ascribed to the Supreme Court

in *Piedmont* a disdain for the economic effects of its decision that is nowhere to be found in the *Piedmont* opinion.

C. Requiring Allocation Leads To Illogical and Inconsistent Distinctions

To construe "furnishing . . . to any vessel" to require allocation of containers to one vessel only results in illogical distinctions among potential lien claimants. There is no substantive difference between the following two transactions: 1) A container lessor leases five containers to Steamship Company *A* and allocates each one for use on only one of five specific vessels; and 2) The same container lessor leases five other containers to Steamship Company *B* for use on five identifiable vessels, without allocating each one to one particular vessel, but the shipowner uses each container aboard one vessel. In each case the container lessor provided five containers to the five vessels, and in each case the vessels benefitted to the same extent by using the containers. There is no logical distinction between these two transactions. Yet the Majority Opinion below would consider only the first group of containers to have been "furnished" and would grant a lien to the container lessor in the first case, but not in the second.

CONCLUSION

This Petition addresses an issue of national (indeed international) importance. The Ninth Circuit decided that issue incorrectly, based upon a misreading of Supreme Court precedent and the Lien Act, and upon the application of a narrow, outdated approach to construing the Act, in conflict with the rulings of courts in other Circuits and with economic realities. The *Piedmont* decision was rendered in 1920, based upon the 1910 version of the Lien Act. It is high time for the Supreme Court to modernize and clarify the *Piedmont* decision to reflect the dramatic statutory, case law, and economic changes since the Supreme Court last had the opportunity to address the issue.

Container Lessors therefore request that the Supreme Court grant this Petition for a Writ of Certiorari.

Dated: June 19, 1987

Respectfully submitted,

GRAHAM & JAMES
ERIC DANOFF

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(Appendices follow)

Appendix A

(1) Itel Containers International Corp.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: Itel Corporation

Subsidiaries (non-wholly owned):
Aitel Container do Brasil S/C Ltds.
Itel Container International GmbH
Itel Container S.r.l.
SSI Containers Ltd.
SSI Navigation of Liberia II, Inc.

Affiliates:
SSI Sea I, Inc.
SSI Sea II, Inc.
SSI Sea III, Inc.
SSI Sea IV, Inc.

(2) Genstar Container Corporation's Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: General Electric Credit Corporation

Subsidiaries (non-wholly owned): Genstar Container International *SARL*

Affiliates: None

(3) Flexi-Van Leasing, Inc.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: Flexi-Van Corporation

Subsidiaries (non-wholly owned):
Flexi-Van Leasing SRL

Affiliates: Flexi-Van Philippines, Inc., a joint venture

(4) Interpool Limited's Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: TBG Holdings, N.V.

Subsidiaries (non-wholly owned): None

Affiliates:
TGB Europe, N.V.
TGB Inc.
Vulcan Industrial Services

(5) Transamerica ICS Inc.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: Transamerica Corporation

Subsidiaries (non-wholly owned):
Transamerica ICS do Brasil S/C Ltda.
Transamerica ICS GmbH
Transamerica ICS (HK) Ltd.
Transamerica ICS Limited
Transamerica ICS Pty. Ltd.

Affiliates: ICS Terminals (U.K.) Limited

(6) Nautilus Leasing Services, Inc.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Nautilus Leasing Services, Inc. has no Parent, Subsidiaries (non-wholly owned) or Affiliates.

Appendix B

Foss Launch & Tug Co., et al.,
Plaintiffs,
and
Transamerica I.C.S. Inc. and Nautilus
Leasing Services, Inc.
and
Flexi-Van Leasing, Inc.,
a corporation,
and
Itel Containers International
Corporation and Genstar
Container Corporation,
and
Interpool Limited,
Plaintiffs-Appellees,
v.
Char Ching Shipping U.S.A., Ltd.,
et al., Defendants,
and
Char Yigh Marine (Panama,) S.A. claimant of vessel M/V C.C. SAN FRANCISCO, her engines, boiler, tackle, appurtenances, furniture and fixtures, in rem, Defendant-Appellant.

No. 85-6351.
United States Court of Appeals,
Ninth Circuit.
Jan. 20, 1987.
As Amended Feb. 5, 1987.

Appeal from the United States District Court for the Central District of California.

Before GOODWIN, WALLACE and ANDERSON, Circuit Judges.

GOODWIN, Circuit Judge.

The only substantial question in this appeal is whether a lessor of container boxes to a company that operates a fleet of container ships can assert a maritime lien against a vessel pursuant to 46

U.S.C. §§ 971-975. The district court granted summary judgment for the lien claimant. We reverse.

The essential facts are not in dispute. Appellees leased containers to CC Line under a series of separate lease agreements. The containers were to be used by CC Line in connection with its transpacific shipping service between various ports in Asia and the United States. Under the lease agreements, containers were delivered to CC Line at different times in a variety of locations. The containers are substantially uniform in design and construction, and are treated by carriers as fungible. Some deliveries under the Flexivan agreements were apparently made to CC Line's own container yards that service its transpacific operations. The Transamerica, Nautilus, Genstar, and Itel leasing contracts, however, provided for the delivery of containers to CC Line at container manufacturing plants and at the lessor's own container depots. Once the CC Line took possession of the containers, CC Line had unrestricted authority to designate which containers would be placed aboard the particular vessels operating in its transpacific service.[1] The lease agreements likewise did not restrict the use of the leased containers to exclusive use in maritime transportation. These boxes are designed for intermodal transportation.

The vessel "CC San Francisco" entered CC Line's transpacific service in 1983. It was specially designed for carrying cargo packed in containers. One or more of each lessor's containers was actually used aboard the "C.C. San Francisco" for the transport of ocean cargo.

In late August, 1984, the vessel "C.C. San Francisco" was arrested in Los Angeles in an *in rem* maritime action by appellees. The registered owner of the vessel, "Char Yigh Marine (Panama) S.A.," thereafter appeared in district court and sought a post-seizure hearing to have plaintiffs-appellees justify their maritime lien claims. Cross-motions for summary judgment were

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[1] This practice is apparently consistent with the current industry practice with respect to containerization. Containers are leased in bulk lots so that they can be employed interchangeably or sequentially in the conveyance of freight by means of various modes of transport including ships, airplanes, railroads, and trucks.

filed with the district court and on August 20, 1985, the district court ruled in favor of plaintiffs' liens. The district court held:

> (1) that the plaintiffs' container leases with "CC Line" are maritime contracts; (2) that plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco" and are therefore "necessaries" within the meaning of 46 U.S.C. § 971; (3) that plaintiffs "furnished" containers to the "CC San Francisco" within the meaning of 46 U.S.C. § 971; (4) that plaintiffs have valid maritime liens for necessaries against the vessel "CC San Francisco" for all containers carried aboard that vessel; and (5), that the maritime lien encompasses all periods plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco," including incidental land use.

Flexivan Leasing, Inc. v. M/V C.C. San Francisco, 628 F.Supp. 1077, 1080 (C.D. Cal.1985).

Appellants raise a number of issues on appeal. The first issue is whether the district court had admiralty jurisdiction. Disputes involving the interpretation of contractual duties in maritime contracts can be proper subjects for resolution in admiralty. *Hinkins Steamship Agency, Inc. v. Freighters, Inc.,* 498 F.2d 411, 412 (9th Cir.1974) (per curiam) (contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, is subject to maritime law and falls under admiralty jurisdiction). We have no difficulty in following the cases which have found similar container leases to be sufficiently related to maritime transportation to support the extension of federal admiralty jurisdiction. *CTI-Container Leasing Corp. v. Oceanic Operations Corp.,* 682 F.2d 377, 380-81 (2d Cir.1982); *American President Lines, Ltd. v. Green Transfer & Storage, Inc.,* 568 F.Supp. 58, 60 (D.Or. 1983); *Integrated Container Service, Inc. v. Starlines Container Shipping, Ltd.,* 476 F.Supp. 119, 125 (S.D.N.Y.1979).[2]

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[2] We express no opinion on the effect of "incidental land uses" of containers employed in "inter-modal" freight conveyance, originating on maritime vessels, upon the proper boundaries of admiralty jurisdiction. We need not decide whether a creditor could permit maritime attachment of containers located far in the interior of the country even though

Of the remaining issues raised on appeal, each turns on an interpretation of the governing federal maritime lien statute, 46 U.S.C. § 971. That statute provides as follows:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971 (1982).

A recent decision of this court, *Farwest Steel Corp., v. Barge Sea-Span 241,* 769 F.2d 620, 623 (9th Cir.1985), instructs that there are three requirements for the grant of a maritime lien under 46 U.S.C. § 971. A person lien claimant must have: (1) furnish[ed] repairs, supplies, or other necessaries, (2) to any vessel, (3) "upon the order of the owner of such vessel, or of a person authorized by the owner." 46 U.S.C. § 971.

The "necessaries" requirement presents no substantial difficulty. The term, in modern interpretations, has been expanded to encompass any item which is "reasonably needed for the venture in which the ship is engaged." 2 S. Friedell, S. Bellman, A. Jenner & J. Loo, *Benedict on Admiralty* § 37 at 3-27 (7th ed. 1986). *See also Farwest Steel Corp.,* 769 F.2d at 623 ("[t]he term 'necessaries' under section 971 refers to 'supplies which are necessary to keep the ship going' ").

The wide range of items that can be characterized as "necessaries" under the Act is exemplified by the result in *Equilease Corp. v. M/V Sampson,* 793 F.2d 598, (5th Cir.1986) (en banc). In *Equilease,* the court stated: "The term 'necessary' under the FMLA [Act] includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function .... What is a 'necessary' is to be determined relative to the requirements of the ship." *Equilease,* 793 F.2d at

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they may have been subject to the preference accorded maritime liens while aboard ship.

603 (citations omitted). The court's resulting conclusion was that "because insurance is essential to keep a vessel in commerce, insurance is a 'necessary' under 46 U.S.C. § 971." 793 F.2d at 604.

During all relevant periods of the operations of the "C.C. San Francisco," cargo containers of the type leased by appellees were more than reasonably necessary to the successful operation of the vessel. Although theoretically it might have been possible to convert the "C.C. San Francisco" from a container carrier to another type of cargo vessel, such transformation or modification was not attempted here. The vessel entered service in 1983 designed to transport cargo containers of the type supplied by appellees. It was engaged in container shipping throughout its time-charter period of operation by CC Line. We therefore hold that containers provided to the "C.C. San Francisco" under the leasing agreements were "necessaries" within the meaning of 46 U.S.C. § 971.[3] *Accord Transamerica ICS, Inc. v. M/V Panatlantic,* 1984 A.M.C. 489, 490 (S.D.Fla.1983) ("the Court is convinced that containers are 'necessaries' within the meaning of 46 U.S.C., sec. 971"); *Nautilus Leasing Services, Inc. v. M/V Cosmos, et al.,* 1983 A.M.C. 1483 (S.D.N.Y.1983) ("we have no difficulty holding that the containers in the instant case are 'necessaries' within 46 U.S.C., sec. 971").

The third requirement, that items be furnished to a vessel under the direction of an "owner" or "authorized person" can also be easily addressed. It is now well established that a bareboat time-charterer of a vessel holds sufficient legal authority over the management of the vessel to subject the vessel to maritime liens. *Gulf Trading & Transportation Co. v. M/V Tento,* 694 F.2d 1191, 1194 (9th Cir.1982), *cert. denied,* 461 U.S. 929, 103 S.Ct. 2091,

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[3] We note without deciding that proof of excess leasing of containers in relation to the capacities of a single vessel or fleet of vessels might undermine a materialman's claim to having furnished "necessary" items to a vessel *See, e.g., Bellingham Nat. Bank v. Oil Screw Pacific Horizon,* 587 F.Supp. 26 (W.D.Wash.1984) (materialman did not "furnish" a fishing net to a particular ship because the net was originally "furnished" for a different ship and then subsequently transferred to the liened ship).

77 L.Ed.2d 301 (1983). The 1971 amendments of the Federal Maritime Lien Act, *see* H.R.Rep. No. 92-340, 92nd Cong., 1st Sess. 1, 3, *reprinted in* 1971 U.S.Code Cong. & Admin.News 1363, 1365 were also partly intended to ensure that any person to whom the management of a vessel is entrusted will be presumed to have authority to procure necessaries and supplies which may give rise to maritime liens. 46 U.S.C. § 973; *Farwest Steel Corp.*, 769 F.2d at 623-24.

In this action, no extraordinary circumstances have been put forward to suggest that CC Line was not in fact entrusted with management authority over the "C.C. San Francisco" during relevant periods of its operation. Accordingly we hold that the appellees entered into container leases with a party adequately authorized by the owner of the vessel "C.C. San Francisco" to support a grant of maritime liens under 46 U.S.C. § 971.

The second requirement, that the lien claimant be a person "furnishing . . . to any vessel," presents a closer question. Its resolution turns on the intent of Congress in drafting a form of the verb "to furnish" into the text of 46 U.S.C. § 971. There is no doubt that containers furnished by the lien claimant were carried on one of a group of vessels intended to carry such containers. The question is whether the lien claimant furnished the attached containers "to" that vessel under the Act. In other words, is it a condition precedent to a lien that containers which have been leased to managers of a fleet of container vessels also must have been specifically set apart for use on the particular vessel against which a lien is asserted?

The "furnishing" question has recently been faced in two other circuits. Apparently in an effort to accommodate the professed expectations and needs of the shipping industry, each court applied a broad construction of "furnishing." In the most recent decision, the Fifth Circuit noted the closeness of the question but nevertheless concluded: "We find no persuasive reason to read the term 'furnishing' . . . narrowly. . . . The statute was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation." *Equilease*, 793 F.2d at 603. Similarly, a Florida district court noted that "for purposes of

creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container be delivered directly to the vessel, be sold rather than leased, or be earmarked for a particular vessel." *Transamerica ICS,* 1984 A.M.C. at 490.

We respect the reasoning of these courts. But we are reluctant to subject the heretofore relatively certain law of maritime liens to the uncertainty and flux of developing shipping industry practices when the controlling precedents governing interpretation of the Act favor a narrow construction of the "furnishing" requirement.

We begin with the plain meaning of 46 U.S.C. § 971. Stripped to its essentials, the statute states that "[a]ny person furnishing . . . necessaries . . . to any vessel. . . . " We note initially that the verb "to furnish" as found in the statute appears in the form of the active and not the passive voice. For example, the statute could have been drafted to state that "necessaries that *are furnished* to any vessel" can support a maritime lien. In such circumstance, it would have been possible for even the fortuitous application or use of necessaries by a vessel to create a valid maritime lien against a vessel. In creating a preferred class of secured creditors, Congress chose not to draft the Act in the passive voice and we think the correct inference is that Congress intended "furnishing" to require active forethought or advance identification of particular vessels in relation to "necessaries" supplied.

This inference is consistent with the historical vessel-specific character of a maritime lien. Under the law of maritime liens, a vessel is considered to be a distinct entity responsible only for its own debts. *Riffe Petroleum Co. v. Cibro Sales Corp.,* 601 F.2d 1385, 1389 (10th Cir.1979). As a consequence, maritime liens are enforced through in rem proceedings, *see* Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims, Fed.R.Civ.P., and jurisdiction lies only in the district where the vessel is located.

Our restrictive interpretation of "furnishing" is supported by longstanding precedents interpreting 46 U.S.C. § 971. *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920), and its progeny are particularly

apposite to this action. In *Piedmont*, the Supreme Court denied maritime liens sought against vessels that had received coal which had been sold to the vessels' owner on credit. The defect was not "in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libelant." *Piedmont*, 254 U.S. at 13, 41 S.Ct. at 5.

Appellees contend that *Piedmont* represents a case driven by a simple failure of proof as to the amounts of coal actually received by each vessel in a group of vessels supplied with coal. However, it is clear that *Piedmont* has not been interpreted in such a limited fashion. In *Bankers Trust Co. v. Hudson River Day Line*, 93 F.2d 457 (2d. Cir.1937), maritime liens were denied a supplier of oil who had delivered oil to a buyer's barges under a single bulk supply contract. In denying the lien, the *Bankers Trust* court understood the holding of *Piedmont* on the "furnishing" question to require that "supplies, though delivered in mass to the owner of the fleet under a single contract, [must be] expressly ordered by the owner and delivered to him by the supplyman for the use of *named vessels in specified portions.*" *Id.* at 458 (emphasis supplied by Second Circuit) (*quoting The American Eagle*, 30 F.2d 293, 295 (D.Del.1929)).

In *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), the Supreme Court decided to grant a maritime lien only after distinguishing *Piedmont* in the following manner: "In the instant case, the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced; and there was nothing in the general contract to the effect that the supplies were to be furnished [to some degree] upon the credit of the vessels." *Id.* at 277. Thus, the holding of *Dampskibsselskabet* should be read to encompass only those cases in which a materialman has taken care, in an ascertainable manner, to designate the items or services he contracts to provide for use on the particular vessel against which a lien is subsequently sought. *See also The Everosa*, 93 F.2d 732, 735 (1st Cir.1937) (lien granted) ("In the present case, the master of a particular vessel requisitioned for coal to the coal company; it was sent to a particular vessel, loaded on her by the coal company's representative and paid for by her master"); *Carr V. George E.*

Warren Corp., 2 F.2d 333, 334 (4th Cir.1924) (lien granted) ("In this case, the coal was actually purchased on the credit of the steamers, billed to the steamers, and used by them.")

Piedmont was also responsible for the incorporation of the *stricti juris* principle, long a feature of the law of maritime liens, *see Vandewater v. Mills*, 60 U.S.82, 19 How. 82, 89, 15 L.Ed. 554 (1857), into the law governing the interpretation of maritime lien under the Act. *Piedmont*, 254 U.S. at 12, 41 S.Ct. at 4. Because the maritime lien under 46 U.S.C.§ 971 is secret and may operate to the prejudice of prior mortgagees and other creditors without notice, it will not be "extended by construction, analogy or inference." *Id.; See also W.A. Marshall & Co. v. S.S. "President Arthur"*, 279 U.S. 564, 568, 49 S.Ct. 420, 421, 73 L.Ed. 846 (1929); *Bankers Trust Co.*, 93 F.2d at 459; *Bellingham Nat. Bank*, 587 F.Supp. at 28-29.

The facts and posture of the instant action parallel those found in *Piedmont*. In each case a materialman provided bulk supplies—coal in *Piedmont*, containers here—in circumstances where the final allocation of supplies, to any vessel of the group intended to be supplied, was left to the discretion of the procuring authority. Although, in both cases, it was understood that the supplies provided would predominantly be put to maritime use, in neither case was there any evident attempt to designate any individual vessel to receive any identifiable component of the supplies.

Appellees vainly attempt to distinguish *Piedmont*. First, they contend that their ability to identify precisely which containers were carried on board the "C.C. San Francisco" at which time adequately answers the concern in *Piedmont* over the grant of equally proportional liens against each of the vessels in the group that received coal. However, this is simply not a distinguishing characteristic. The *Piedmont* holding was not made contingent on the district court's inability to establish the exact amount of coal used by a particular vessel in the group. Rather, the defect was in the unstructured character of the contractual arrangements for the supply of coal to the *Piedmont* vessel group. *Piedmont*, 254 U.S. at 13, 41 S.Ct. at 4.

Second, appellees argue that the fact that the coal supplied in *Piedmont* was found to have been partially consumed in the owner's dockside factory instead of in vessels potentially subject to maritime liens is a distinguishing characteristic. While the Supreme Court did note that it was concerned about the potential for nonmaritime use of coal supplied to the owner's dock, *see Piedmont,* 254 U.S. at 13, 41 S.Ct. at 4, a similar problem is presented here by the potential for "inter-modal" use of containers. In an attempt to cure this deficiency, the district court granted maritime liens only to the extent that containers were the "functional equivalent of the hold" of the "C.C. San Francisco." However, under the leasing agreements entered into with CC Line, none of the appellees restricted the "inter-modal" use of their leased containers to exclusively maritime conveyance. Thus, despite the district court's holding below, it cannot be gainsaid that nonmaritime use analogous to that in *Piedmont,* was permitted under the container leasing agreements in issue here.

Finally, it is particularly instructive to compare the similarity in the reasoning supporting the holdings of both the district court in *Piedmont* and the district court in this action. The *Piedmont* district court, in its attempt to justify a broad interpretation of the "furnishing" requirement, stated:

> "As supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet, as supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels, as at the time supplies are ordered there may be uncertainty as to which vessel may require them and use them, *the statute should receive a construction which will make it applicable to and consistent with modern business conditions.* A supply man who furnished supplies ready for any vessel of a fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of the vessel which is to require the supplies."

240 F. 147, 153 (D.R.I.1917) (emphasis added). The district court in this action similarly stated that

> "In light of today's shipping practices [the bulk leasing of containers], defendant's contention that a container need be furnished to a specific vessel, rather than to a fleet of vessels, in order for a valid maritime lien to exist, is highly impractical."

Flexivan, 628 F.Supp at 1079 (emphasis added).

Like the Supreme Court in *Piedmont*, we are not persuaded that "modern business conditions" in the shipping industry are sufficient justification to expand the "furnishing to any vessel" requirement of 46 U.S.C. § 971.[4] Accordingly, we hold that cargo containers leased in bulk to a time-charterer of a group of vessels for unrestricted use on board the vessels in that group, are not furnished to any particular vessel of the group, on which they subsequently happen to be employed, within the meaning of 46 U.S.C. § 971.

We reverse the order of the district court with respect to the establishment of maritime liens under the Federal Maritime Lien Act, 46 U.S.C. § 971. This cause is remanded to the district court for further proceedings as may be necessary to discharge the lien.

Reversed and remanded.

J. BLAINE ANDERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that the district court had admiralty jurisdiction over the contracts and that the cargo containers are necessaries under the Federal Maritime Lien Act. Also, I agree

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[4] Appellees' contention that there is no substantive difference between a container company leasing 10 containers to steamship company A, pre-allocating them only for use on a group of 5 specified vessels, and that company leasing 10 other containers to steamship company B, without pre-allocation but where the containers actually were carried aboard five vessels, misses the mark. We are presented with a question of interpretation of the statute and under a narrow interpretation of "furnishing," in neither case would a maritime lien likely attach. The relevant comparison is between companies A & B and a company C which leases an identified set of containers specifically for use on a named vessel.

that the container leases were entered into by a party authorized to support a lien on the vessel "C.C. San Francisco."

With respect to the holding that the containers were not furnished to the vessel "C.C. San Francisco" in particular, however, I disagree with the majority. In my view, the containers were "furnished" to the vessel under 46 U.S. § 971 in a manner sufficient to attach a lien. The majority finds a restrictive reading of the "furnishing . . . to any vessel" requirement is supported by inferential Congressional intent and prior cases interpreting section 971. For me, these two bases are not persuasive. The active and not passive language used in the statute is not a distinction which supports the inference that Congress intended a restrictive reading when viewed against the purpose of the Act. Also, previous cases interpreting section 971 support a broader interpretation of the furnishing requirement.

The purpose behind the Act, as amended in 1971, was as a matter of equity to protect suppliers who in good faith furnish necessaries to a vessel. *See,* H.R.Rep. No. 92-340, 92nd Cong., 1st Sess. 1, *reprinted in* 1971 U.S.Code Cong. & Ad.News 1363-1365; *Equilease Corp. v. M/V Sampson,* 793 F.2d 598, 603 (5th Cir.1986) (en banc) ("The statute [46 U.S.C. § 971] was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation"). If the purpose of the Act is to be fulfilled, the construction of the "furnishing . . . to any vessel" requirement should not be a restrictive one. The majority's restrictive interpretation is contrary to the purpose Congress expressed when it amended the Act. In this, the majority places reliance for its holding upon the fact that the verb "to furnish" is active and not passive. I find this distinction to be of little weight. While use of the active voice may create an inference of Congressional intent, such an inference should be decidedly subordinate to Congress' stated purpose. *See Gulf Trading and Transportation Co. v. M/V Tento,* 694 F.2d 1191, 1194 (9th Cir.1983).

I also find the cases cited by the majority to be inapposite. The question presented is: "Is it a condition precedent to a lien that containers which have been leased to managers of a fleet of

container vessels also must have been specifically set apart for use on the particular vessel against which a lien is asserted?" The answer has already been provided and the answer is "no." In *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920), the Court stated:

> [T]he fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract . . . each vessel so receiving supplies may be made liable for the supplies furnished to it.

Id. at 10-11, 41 S.Ct. at 4 (citations omitted). The majority's reliance on *Piedmont* is misplaced. In *Piedmont,* delivery was not made to the vessels but to another location, the owner's factory. The parties understood that the owner would be dividing the supplies (coal) between the factory and the vessels. Title to the supplies passed to the factory as an entity before the supplies were divided for vessel and non-vessel usage. *Piedmont* is therefore clearly distinguishable on this ground.

Here, there is no question the lessor presented the containers to CC Line for use by the vessels. The containers were not diverted, after the passing of title to another entity, for non-vessel use. That the CC Line had the authority to interchange the containers between particular vessels is of no consequence since "each vessel so receiving supplies may be made liable for the supplies furnished to it." *Piedmont* at 11, 41 S.Ct. at 4.

Later, in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 1197 (1940), the Court interpreted *Piedmont* as permitting a lien to attach, in that the supplies were "furnished," where delivery was made to a number of vessels since the supplies were presented exclusively for the vessels in question. *Dampskibsselskabet* at 277, 60 S.Ct. at 94. From this it is clear that a contract for delivery of supplies to a number of vessels without designation of particular vessels will not cause a maritime lien to fail under section 971 for want of

"furnishing . . . to any vessel" as long as there is no diversion of title to an intermediate entity.

The additional cases cited by the majority err for the same reason the majority opinion does. They read *Piedmont* too narrowly. The controlling feature of *Piedmont* is not the result reached but the principle stated. *Piedmont* and its progeny allow a lien to attach to a particular vessel, even though the supplies were not delivered to a prespecified vessel, if the vessel in fact received the supplies furnished.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 85-6351
CV No. 84-6289-JWC

Foss Launch & Tug co. and Port Angeles Pilots Assn.,
Plaintiffs,

and

Transamerica I.C.S. Inc. and Nautilus
Leasing Services, Inc.
Plaintiffs-Appellees,

v.

Char Ching Shipping U.S.A., Ltd., et al.,
Defendants,

and

Char Yigh Marine Panama, S.A.; and
M/V C.C. San Francisco, in rem,
Defendants-Appellants.

[Filed April 23, 1987]

ORDER

Before: GOODWIN, WALLACE and ANDERSON, Circuit Judges

Judges Goodwin and Wallace have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Anderson would grant the petition for rehearing and allow the suggestion for en banc rehearing.

The full court was advised of the suggestion for rehearing and no active judge called for a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix D

Flexivan Leasing, Inc., Genstar Container Corporation, Interpool Limited, Itel Containers International Corporations, Nautilus Leasing Services, Inc. and Transamerica ICS. Inc., Plaintiffs,

v.

M/V C.C. San Francisco, her engines, tackle, apparel, furniture and fixtures, in rem, Defendants,

The Vessel C.C. San Francisco,
Garnishee.

Nos. CV 84-6331-JWC, CV 84-6175-JWC,
CV 84-6243-JWC and CV
84-6289-JWC.

United States District Court,
C.D. California.

Aug. 20, 1985.

ORDER RE PLAINTIFFS' SUMMARY JUDGMENT MOTION TO ESTABLISH MARITIME LIEN

CURTIS, District Judge.

INTRODUCTION

On July 1, 1985, in response to defendant Char Yigh Marine (Panama) S.A.'s Kenoticed Motion to Compel Plaintiffs *In Rem* to Justify Maritime Arrests, this Court found that the *in rem* arrests of the vessel "CC San Francisco" by the container lessor plaintiffs were colorably valid, thereby validating this Court's continued admiralty jurisdiction over the claims. The Court therefore ordered the matter to proceed, and requested that the container claimants submit motions for summary adjudication

under FRCP 56 as to all issues regarding the *in rem* claims which are not subject to substantial controversy.

The Court now has before it summary judgment motions brought by the container claimants seeking to establish, as a matter of law, that the containers provided to "CC Lines" give rise to maritime liens. This opinion governs the motions of Flexi-van Leasing, Inc. (CV 84-6331), Genstar Container Corporation (CV 84-6175), Interpool Limited (CV 84-6243), Itel Containers International Corporation (CV 84-6175), Nautilus Leasing Services, Inc. (CV 84-6289), and Transamerica ICS, Inc. (CV 84-6289). Although the facts and contracts relied upon differ slightly from case to case, they each present this same question of law. Rather than discussing the specific facts of each case, this order respectively adopts and incorporates by reference the Statements of Uncontroverted Facts and Conclusions of Law submitted concurrently by each of the container claimants with their motions.

DISCUSSION

In this *in rem* action, plaintiffs seek to confirm that they have maritime liens for necessaries based on containers furnished to the vessel "CC San Francisco." Plaintiffs further seek to establish that the lien encompasses all periods the containers served as the "functional equivalent" of the vessel's hold, including incidental land uses.

The governing statute is the maritime lien statute, 46 U.S.C. § 971. It provides:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

The first requirement for a maritime lien under § 971 is that the container or equipment be a "necessary." A "necessary" is any

item furnished to a vessel which is reasonably necessary for the venture in which that particular ship is engaged. *Clubb Oil & Tools, Inc. v. M/V George Vergottis,* 460 F.Supp. 835, 841 (S.D.Tex.1978). Containers are portable receptacles in which large numbers of smaller packages may be transported. They are the modern substitute for the hold of the vessel. *Leather's Best, Inc. v. Mormaclynx,* 451 F.2d 800, 815 (2nd Cir.1971). It is clearly established that containers are necessary to a container ship's operation. *Nautilus Leasing Services, Inc. v. M/V Cosmos, et al.,* 1983 AMC 1483 (S.D.N.Y.1983); *Transamerica ICS, Inc. v. M/V Panatlantic,* 1984 AMC 489 (S.D.Fla.1983). Since the "CC San Francisco" carried only containerized cargo while in the service of the "CC Line," containers were more than reasonably necessary for her operation.

The second requirement, and the one around which this controversy is centered, is that the containers be "furnished to" the "CC San Francisco." It is undisputed by the parties that the containers were supplied by the container claimants to "CC Lines" for use in its transpacific shipping service between various ports in the Far East and the West Coast of the United States.

However, because the containers were not supplied to the "CC San Francisco" specifically, defendant argues that the "furnishing to any vessel" requirement has not been met. Plaintiffs, on the other hand, submit that by furnishing containers to "CC Lines" for exclusive use on board its fleet of container vessels, and by virtue of their actual use on board the "CC San Francisco," plaintiffs furnished containers to the vesssel within the meaning of 46 U.S.C. § 971. The Court agrees with plaintiffs.

The use of containers in shipping has been characterized as "one of the most important technological developments in the transportation of goods by sea since steam replaced sail." Simon, *The Law of Shipping Containers,* 5 J.Mar.L. & Com. 507 (1974). *See also CTI-Container Leasing v. Oceanic Operations,* 682 F.2d 377, 380 (1982). The Supreme Court has recognized how containerization has revolutionized maritime cargo-handling techniques, noting that

> "containerization permits the time-consuming work of stowage and unstowage to be performed onland in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo onto the vessel."

Northwest Marine Terminal Co. v. Caputo, 432 U.S. 249, 270, 97 S.Ct. 2348, 2360, 53 L.Ed. 320 (1977) (footnote omitted).

One of the key advantages of containers is that they allow the use of several different modes of transportation—marine, motor, rail, or air—to transport goods on a door to door basis. *See* Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry,* 10 J.Mar.L. & Com. 311 (1979). As the evidence in this case indicates, containers are routinely leased by shipping lines without specification as to the exact vessel on which they may be used. In fact, a container can be used on several different vessels during the duration of its lease. In light of today's shipping practices, defendant's contention that a container need be furnished to a specific vessel, rather than to a fleet of vessels, in order for a valid maritime lien to exist, is highly impractical. In addition, and most importantly, it is unsupported by the law.

The delivery of necessaries to a fleet of vessels gives rise to a maritime lien to the extent the necessaries in fact were placed on individual vessels in the fleet. Moreover, those necessaries can be supplied to a fleet pursuant to a single contract. *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California,* 310 U.S. 268, 276-77, 60 S.Ct. 937, 941-42, 84 L.Ed. 1197 (1940); *Brock v. SS Southhampton,* 231 F.Supp. 280, 282 (D.Ore.1964); *Jeffrey v. Henderson Bros., Inc.* 193 F.2d 589, 593-94 (4th Cir.1951). In *Transamerica ICS Inc. v. M/V Panatlantic,* 1984 A.M.C. 489 (S.D.Fl.1983), the court found that defendant's vessel's containers were "necessaries," and also noted that the requirement that such necessaries be "furnished to" a vessel does not require direct delivery on the basis of separate contracts for each vessel. The court stated:

> "After reviewing the history and operation of the container leasing business as explained by plaintiffs, the Court is

> convinced that containers are "necessaries" within the meaning of 46 U.S.C. sec. 971. Furthermore, for purposes of creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container be delivered directly to the vessel, be sold rather than leased, or be earmarked for a particular vessel. . . . [T]he Supreme Court has noted how the courts and Congress have accommodated maritime law to modern cargo-handling techniques. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 268-72, 97 S.Ct. 2348, 2359-61, 53 L.Ed.2d 320, 1977 AMC 1037, 1051-55 (1977)."

In light of the above authority, and consistent with modern shipping practices, the Court holds that the delivery of containers to a fleet of vessels, without specification as to a specific ship, does not defeat a maritime lien where the actual use of those containers aboard a specific ship can be proved.

Defendant also raises several additional arguments as to why plaintiffs should be denied their maritime lien. Suffice it to say, however, that at oral argument, defendant admitted that its main legal argument concerns lack of delivery to a specific ship, and that the rest of the arguments raised were "fluff." Thus, without going into the specifics of those arguments for purposes of their rejection in this opinion, the Court hereby holds (1) that the plaintiffs' container leases with "CC Line" are maritime contracts; (2) that plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco" and are therefore "necessaries" within the meaning of 46 U.S.C. § 971; (3) that plaintiffs "furnished" containers to the "CC San Francisco" within the meaning of 46 U.S.C. § 971; (4) that plaintiffs have valid maritime liens for necessaries against the vessel "CC San Francisco" for all containers carried aboard that vessel; and (5), that the maritime lien encompasses all periods plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco," including incidental land use. Proof of plaintiffs actual damages under their maritime liens await further proceedings.

Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2009

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ITEL CONTAINERS INTERNATIONAL CORP.;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

vs.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Should a maritime lien for unpaid container rentals be created against a vessel where the containers onboard were never "furnished" to the vessel by the container lessor but were only some of many thousands previously supplied in bulk to the vessel operator for general use in its intermodal transportation business?

LIST OF PARTIES

Respondent concurs in Petitioners' List of Parties. Char Yigh Marine (Panama) S.A., claimant of C.C. SAN FRANCISCO *in rem* has no subsidiaries or affiliates; its parent company is SB General Leasing (Hong Kong) Co., Ltd.

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GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

VS.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

Char Yigh Marine (Panama) S.A., appearing restrictively under Federal Rules of Civil Procedure Supplementary Admiralty Rule E(8) as claimant to C.C. SAN FRANCISCO, a vessel *in rem,* respectfully urges this Court to deny the petition for certiorari, on the basis of *Piedmont & Georqe's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1 (1920).

The lower court opinion denying a maritime lien is reported at 808 F.2d 697 (9th Cir. 1987).

JURISDICTION

The Ninth Circuit has refused to recall or to stay its mandate, which has been returned to the District Court for action. The Circuit's instructions are "for further proceedings as may be necessary to discharge the lien." The mandate will be spread on or after August 3, 1987 at which time it is within the District Court's power to discharge the security and to extinguish subject-matter jurisdiction *in rem.*

STATEMENT OF THE CASE

The six petitioners are lessors of containers for use in intermodal transportation. They leased enormous quantities of containers to C.C. Line, a Taiwanese operator of container ships, for use in its intermodal service from ports in the Far East to all points in the United States.

Once C.C. Line took possession of these intermodal containers from the lessors, C.C. Line had unrestricted authority to designate their use, including which containers would be placed onboard any of its vessels, and when. This is consistent with industry practice worldwide: containers are fungible, with standard dimensions, and are routinely carried by a combination of vessel, truck and rail for delivery to points far inland. Containers are not generally dedicated to the use of one vessel, but are carried intermodally on whatever truck, chassis, flatcar, barge or vessel as may be necessary to complete their various journeys.

Petitioners invoiced C.C. Line monthly for the *per diem* charges for all containers and chassis on hire the previous month. No segregation of invoice charges was made by vessel, nor by time at sea or time on land, and no vessels were identified in any invoice.

C.C. Line fell into default on its payments of container and chassis hire to the lessors, who summarily arrested C.C. SAN FRANCISCO in August, 1984.[1] C.C. Line defaulted, and is defunct; Char Yigh, the vessel's owner, and unrelated to C.C. Line, was forced to post security for the release of its vessel.[2]

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[1] At that time, there was no judicial review of the factual basis for the warrant of arrest prior to arrest.

[2] The container lessors' claims were initially enormous, even *in rem* exceeding $20 million. These claims were subsequently dramatically modified, and are now believed to be less than the outstanding $2.2 million security.

Very soon after the arrest, Char Yigh contended that no maritime lien existed under the *Piedmont* doctrine. The District Court disagreed. The Ninth Circuit reversed the District Court and applied the *Piedmont* doctrine to deny the novel, intermodal lien sought by petitioners.

> "Accordingly, we hold that cargo containers leased in bulk to a time-charterer of a group of vessels for unrestricted use on board the vessels in that group, are not furnished to any particular vessel of the group, on which they subsequently happen to be employed, within the meaning of 46 U.S.C. §971." 808 F.2d at 703 (9th Cir. 1987).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Piedmont Decision of 1920 Is Still Good Law, And Has Not Been Modified Subsequently In Any Respect.

The Ninth Circuit ruled that the original general delivery of fungible containers to a ship operator, coupled with the intervening independent judgment of the containership operator in selecting the particular carrying vessel from his fleet, prevented any maritime lien arising against the carrying vessel.

The Ninth Circuit expressly relied for its decision on *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920), a unanimous decision of this Court which, while predating the invention of containers, clearly stated the principle involved, under general maritime law and under the Federal Maritime Lien Act, codified at 46 U.S.C. §971-75.[3]

In *Piedmont*, the commodity was bulk coal, subsequently used aboard several vessels; in the present case, the commodity

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[3] Because these containers were delivered abroad, on land, to Taiwanese and Hong Kong companies for use with Panamanian vessels, we do not believe the Federal Maritime Lien Act applies *ex proprio vigore*. But since the Act did not amend general maritime law principles of "furnishing", cases under the Act are as apposite as general maritime lien law cases.

is bulk containers, subsequently used aboard numerous C.C. Line vessels. The item has changed, but the principle has not: a lien is a property right in a particular vessel and arises from services devoted to the particular needs of that particular vessel at the time of service. It is not a general security interest and does not extend to the provision of general services to the vessel's operator.

Lien rules are strict because the lien is secret, unrecorded, and easy to assert in retrospect.[4] The lien is perfected by an extraordinary summary arrest, with connotations of insolvency and unreliability wholly absent from a UCC-1 security interest filing. The lien is frequently created in obscure situations at unusual times and in faraway places. Often the parties who contest the lien, being the shipowner and other lien holders, did not incur the lien and have no knowledge of it until the seizure.

The owner needs assurance that the goods or services were supplied to his particular ship, and not to some other vessel in the operator's fleet. The present shipowner, for instance, may be prejudiced by liens allowed by an earlier shipowner (since liens are indelible), or by liens incurred (as alleged here) by the defunct time-charterer of the vessel. The other genuine lien creditors need confirmation of dates of supply and amounts of lien for the ranking of relative priorities, both between themselves, and as against a mortgage holder.

Therefore, the rule exists that the lien must be seen to arise objectively, through the manifestation of a contemporary intent to supply a particular item to a particular vessel.[5] Any other

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[4] Justice Brandeis' elegant phrase that the maritime lien is *"stricti juris*, and will not be extended by construction, analogy or inference" will be found in varying forms in many cases. They are originally based on Justice Curtis' statements in *The Kiersage*, 14 F. Cas. 466, 467 (D. Me. 1855)(No. 7,762).

[5] Now that the latest amendments to the Supplemental Admiralty Rules require judicial review of the apparent validity of the complaint before arrest (Rule C(3) effective August 1, 1985), the District Judge also needs the objective assurance of specific supply of particular items to a particular ship, supported by contemporary invoices or delivery records.

rule would lead itself to the very real risk of fraudulent or collusive lien claims.

Justice Brandeis, and the unanimous Court for which he wrote, invoked very basic principles of lien theory for his view that no maritime lien should be granted, and cited well respected authority such as *The Alligator,* 161 F. 37 (3rd Cir. 1908) and *Astor Trust Co. v. E.V. White & Co., Inc.,* 241 F. 57 (4th Cir. 1917) which dealt with similar problems, and found no lien.[6]

Justice Brandeis then demolished the theory that the (new) federal maritime lien act was intended to broaden the scope of the lien, finding that the language of the statute afforded no basis for that assertion, while the Reports of the Committees of Congress showed that it was unfounded:

> "The reports expressly declare that the bill makes 'no change in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes'." 254 U.S. at 11-12.

No subsequent amendment to the Act has, in any way, addressed *Piedmont:* the statutory record is devoid of any suggestion that *Piedmont* was being questioned, overruled or modified. *See* Maritime Lien Act of 1920, ch. 250, §30, 41 Stat. 1005 (1920), *as amended by* Act of Aug. 10, 1971, Pub. L. No. 72-79, 85 Stat. 285 (1971).

Cases subsequent to *Piedmont* have simply clarified its general rule. In *Banker's Trust v. Hudson River Day Lines,* 93 F.2d 457 (2d Cir. 1937), a unanimous panel (of Judges Learned Hand, Augustus Hand and Swan) denied a lien for

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[6] Of cases in this vein, *The Bethulia,* 200 F. 879 (D. Mass. 1912) is clear, simple, subsequently ratified in *Walter E. Heller & Co. v. M/V MR. ED,* 273 F. Supp. 926 (E.D. La. 1967), and exactly reflected in *Kopac v. Bold Venture,* 1987 AMC 192 (W.D. Wash. 1986).

"fuel undesignated as to destination except that it was for vessels of the buyer's fleet." 93 F.2d at 457. The supplies were distributed by the buyer in its discretion, and the seller made no attempt to deliver the fuel directly to any vessel, nor to invoice any vessel for fuel used onboard. The same lack of direct supply prevents a lien here. In *D/S A/S Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), a lien was found to exist where significantly different facts from *Piedmont* and *Banker's Trust* were found—the oil supplier had delivered its oil to a holding facility, which it controlled, in the vicinity of the ships; thereafter, oil was supplied to specific vessels, identified as so supplied, and promptly invoiced to them for their account. These are not the facts in our case.

Piedmont, Dannebrog and *Banker's Trust* establish the principle that while supplies can be delivered in mass to the owner of a fleet under a single contract, they must be expressly ordered by the owner and "delivered to him by the supplyman for the use of *named vessels* in *specified portions.*" in order for a lien to arise. *Banker's Trust,* 93 F.2d at 458 (emphasis in original).[7]

Petitioners have consistently relied on a disparaging comment in the second edition of *Gilmore & Black's* admiralty textbook to limit *Piedmont*—but have been seduced by the quotability of the phrases, and have not examined the sense or the footnotes. Those two professors agree that *Piedmont* stands, ineluctably, for the *stricti juris* principle that a lien cannot be created by analogy or inference, and requires that the necessary supplies be furnished *to* the specific vessel *by* the lien

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[7] The Ninth Circuit's dissent appears to have overlooked *Banker's Trust,* and so to have misunderstood the comment in *Piedmont* allowing use of a general supply contract. The form of the contract is irrelevant; instead, it is the subsequent act of supplying particular items for the needs of a particular vessel which creates the lien.

See also The American Eagle, 30 F.2d 293 (D. Del. 1929).

claimant, with copious reference to *Banker's Trust. (Gilmore & Black, The Law of Admiralty, (2d Ed. 1975), §9-36, pp. 661-2).*

Further, contrary to the petitioners' assertions, there is no conflict between circuits by virtue of the Fifth Circuit's decision in *Equilease Corporation v. M/V SAMPSON,* 793 F.2d 598 (5th Cir. 1986 *en banc).* Analysis of *Equilease* shows the conflict exists only in *obiter dictum* of the Fifth Circuit as to the scope of the "furnishing" doctrine, since the facts show that marine insurance was furnished to specific vessels.[8] *Equilease* involves the interpretation of 1899 Fifth Circuit authority, whether it remained correct under Louisiana law to deny a maritime lien for unpaid insurance premiums on specific vessels: it does not involve the general supply of containers for unconstrained intermodal use. The doctrine of conflict requires a true conflict, on the facts, (*see Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 392-93 (1923); R. Stern, E. Grossman & S. Shapiro, *Supreme Court Practice,* (6th Ed. 1986), pp. 196-97), and not merely a philosophical or apparent conflict as to the scope in general of the "furnishing" doctrine.

Piedmont is not an aberrational decision, nor has it been judicially restricted. It is compatible with maritime practice elsewhere. Petitioners stress that their containers ". . . are carried by their lessee ship operators to the four corners of the globe." Petition at 5. Therefore, it is of more than passing interest that English law and practice forbids the arrest of a containership for unpaid container rentals. *See, Gatoil International, Inc. v. Arkwright-Boston, etc.,* [1985] 1 All E.R. 129 (H. of L.) expressly overruling the contrary case of *The Sonia S,* [1983] 2 Lloyd's Rep. 63 (C.A.). Containers cross national boundaries on trucks and railroads, yet no railroad and no truck lien exists, nationally or internationally. It would be a needless anomaly to create a special rule against vessels, in the United States, alone.

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[8] 793 F.2d at 600. *Equilease* is an abnormally recondite case even for admiralty.

Finally, the comments of the present administration in opposition to any expansion of the maritime lien are worthy of note:

> "Nothing compels stevedores and others to extend credit to those who they determine are not credit worthy.
>
> Requiring payment in advance, bonds or letters of credit are standard commercial practices which can be utilized in situations where concern exists whether a vessel or its owner will pay its bills." [9]

We suggest the rule of *Piedmont* is clear and denies a lien to the petitioners here.

2. Something More Than A Mere Denial of Certiorari Is Needed.

This is not such a case as meets the considerations governing review on certiorari under Supreme Court Rule 17.1. The Ninth Circuit's interpretation of *Piedmont* and of the Maritime Lien Act is correct and, in ordinary circumstances, it would be sufficient for this Court to deny *certiorari.* But a denial of *certiorari* of itself has neither precedential nor directive value.

It is suggested that this is such a case as should be disposed of by "a summary disposition on the merits" under Supreme Court Rule 23.1 in order to give guidance to the Circuits. Such an action is unusual, but not unprecedented, and has been used in the past to reaffirm Court decisions of long standing.[10]

Substantial hardship would be caused by awaiting the traditional conflict between circuits. The claimed container lien is novel, and is disproportionately large in its aggregation of

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[9] *Hearings on H.R. 1307 Before Subcomm. on Merchant Marine of the House*, 98th Cong., 1st Sess. 559 (May 20, 1983) (statement of Stuart Breidbart, Chief Counsel MARAD).

[10] The Court has taken such action in the past "to clarify whatever uncertainty might exist" where a longstanding rule has been attacked. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977).

millions of dollars of rental, repairs, renovation and losses. Its potential existence in other circuits discourages entrepreneurial ship finance, since the claimed lien "primes" and overwhelms any foreign mortgage; its actual existence would work a hardship on those traditional, small businessmen (ship chandlers, victuallers, repairmen, stevedores, fuel suppliers) genuinely covered by the Maritime Lien Act. Their liens, in most cases, possess a certain priority over the mortgage and so have a value even when the vessel is worth less than its mortgage. But, if the container lessors have their way, these liens would be effectively devalued to the point of extinction on containerships, since they would be overwhelmed by the equally ranking, but enormous, container rental liens. Such a lien would not exist on trampships, bulk carriers, car carriers, tankers and the like, and so there would be created a cruel and anomalous discrimination against traditional lien suppliers to containerships, only. Indeed, if this Court awaits a conflict between Circuits, such a preventable anomalous result must be accepted.

The Ninth Circuit has denied the lien, but the other circuits are silent. Continued uncertainty will foster injustice. A short sharp arrest, or even the threat of one, is well known in admiralty: the adverse effect of an arrest on business, on scheduling of vessels, on credit is so severe that a ship operator will generally knuckle under. The imputation of bankruptcy that accompanies publication of the arrest is a powerful weapon. The more resolute, or desperate, container lessors can be expected to make such threats in other circuits despite the Ninth Circuit's position.[11] Even a subsequent loss in another Circuit may be no real deterrent where the ship operator (like C.C. Line here) has been put out of business by the fanfarronade of an invalid arrest.

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[11] The threat already exists in the Petition:

> "A container lessor may be unable to enforce a claimed maritime lien against a vessel detained at Los Angeles, but may be able to enforce the claimed lien against that same vessel if it calls, for instance, at New Orleans". Petition at 12.

Equally, if the operator survives, negotiation of settlement is such an ingrained habit in admiralty that few of the actual or threatened arrests are likely to reach trial, and fewer still to move on to appeal. So the industry is likely to be in confusion for many years if *certiorari* is silently denied here, with the advantage (except in the Ninth Circuit) going to the aggressors, the lessors.

Full consideration of the issues will not be slighted by review here on the basis of the *certiorari* petition. The facts are not in dispute, are simple and straightforward and accurately reported by the Ninth Circuit. Six of the largest container lessors are involved in the present action, and have fully briefed their issues in the District Court and in the Ninth Circuit. Because of the central position of *Piedmont,* the petition for *certiorari* is already petitioners' brief on the merits. They have coordinated their approach with, and are reported to have the active assistance of, their trade association, the Institute of International Container Lessors. The Circuit opinion also contains a reasoned dissent addressing *Piedmont* which, we all agree, is the lynchpin.[12] Consequently, the Court is faced with a fully articulated issue.

Piedmont established the rule, consistently adopted thereafter, that a lien supplier has to deliver and earmark specific goods for use on specific vessels. The supplier loses his lien if he delivers goods to the ship operator generally and permits the operator to designate the receiving vessels. The lien arises from the particular vessel needs of the ship at the time and place of supply, and not from the general business needs of the operator.

---

[12] We believe the dissent misconstrues *Piedmont* and suggest the best argument in reply is found in *Banker's Trust Co. v. Hudson River Day Line,* 93 F.2d 457 (2d Cir. 1937).

The rule of *Piedmont* is as logical and apposite today as it was in 1920; it has lost none of its correctness in the intervening sixty-seven years. No principles would be changed by a reaffirmation of the validity of a well-respected case, while much future unnecessary expense and business interruption would be avoided.

CONCLUSION

The Court is urged to deny *certiorari* stating in its order that it is doing so on the basis of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920).

DATED: July 20, 1987

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and am over the age of eighteen years and not a party to the within action or proceeding, that my business address is c/o Pandick, California, 1900 South Figueroa Street, Los Angeles, California 90007, that on this 20th day of July, 1987, I served the within RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI in the said action and by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 20, 1987 at Los Angeles, California.

By: Mark M. Schaefer

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No. 86-2009

Supreme Court, U.S.
FILED
JUL 22 1987
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ITEL CONTAINERS INTERNATIONAL CORP.;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS, INC.;
and NAUTILUS LEASING SERVICES, INC.;
Petitioners

vs.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents

Brief Of Institute Of International Container Lessors, Ltd., As *Amicus Curiae* In Support Of Petition For Writ Of *Certiorari* To The United States Court of Appeals For The Ninth Circuit

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Detroit Trust v. The Thomas Barlum, 293 U.S. 21 (1934) 19

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H.R. Rep. No. 272, 61st Cong., 2d Sess. 12

S. Rep. No. 831, 61st Cong., 2d Sess. 12

Treatises and Periodicals

Containerization International, World Container Census (Sept. 1986) 1

Containerization International Yearbook (1987) 1

Containerization International Yearbook (1973) 1

G. Gilmore & C. Black, The Law of Admiralty (2d Ed. 1975) ..... *passim*

A. Jenner, B. Chase, & J. Loo, 1 Benedict on Admiralty (1975 & Supp. 1986)..... 5

A. Jenner, B. Chase, & J. Loo, 2 Benedict on Admiralty (1975 & Supp. 1986) .....*passim*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Institute of International Container Lessors, Ltd. (IICL) submits this brief *amicus curiae* with the consent of the parties. The IICL, the trade association for the international marine container leasing industry,[1] includes most of the world's large container leasing companies and some of the smaller ones.

IICL member companies lease marine cargo containers to shipping lines for ocean transportation of manufactured goods, raw materials, and agricultural products. The world population of containers is now above five million TEU,[2] and containers have become the world's chief method of ocean carriage of manufactured cargo.[3] Container lessors own 50.8% of the world's container fleet,[4] while virtually all of the remainder is directly owned by ocean carriers. The total United States container population is approximately 1.9 million TEU, of which more than 1.4 million TEU (77%) is owned by American leasing companies.[5]

As supplier of more than half of the containers used by the world's ocean carriers, the container leasing industry is essential to ocean commerce. Container lessors thus have an

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[1] A list of IICL members appears as Exhibit A. IICL is a Delaware nonprofit membership corporation with headquarters in New York. IICL previously has been granted the privilege of *amicus* status by this Court in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

[2] CONTAINERIZATION INTERNATIONAL YEARBOOK 16 (1987). TEU is an acronym for Twenty-foot Equivalent Unit. Containers are internationally standardized at two fungible sizes, twenty feet and forty feet. TEU is a measure of container fleet size: one 20-foot container is one TEU; one forty-foot container is two TEUs.

[3] World port container traffic increased from 15,031,000 TEUs handled in 1973, CONTAINERIZATION INTERNATIONAL YEARBOOK 11 (1973) to 55,789,000 TEUs in 1985. CONTAINERIZATION INTERNATIONAL YEARBOOK, *supra* note 2 at 7 (1987).

[4] CONTAINERIZATION INTERNATIONAL, WORLD CONTAINER CENSUS (SEPT. 1986).

[5] UNITED STATES MARITIME ADMINISTRATION, INVENTORY OF AMERICAN INTERMODAL EQUIPMENT 48 (1986).

inextricable interest in the United States general maritime law and, in particular, in their rights under the U.S. Maritime Lien Act.[6]

Ocean carriage of cargo in containers is only a generation old, and the container leasing industry is only perhaps half that age.[7] Nevertheless, the U.S. general maritime law has accommodated the new technology and the new leasing industry. In sharp contrast, the decision below[8] freezes the development of the law. Indeed, the decision turns the clock back four generations, to a time when ships were powered by coal and cargo was carried in burlap bags.

The United States, generally, is the most important trading partner of each of the world's industrialized nations. Hundreds of ships call at U.S. ports each day. Typically, a container vessel is on liner trade and calls on several U.S. ports in the course of a voyage. If the decision below is permitted to stand, a container lessor who wishes to arrest a vessel *in rem* in order to execute its maritime lien will be forced to wait until the vessel calls at a port outside the Ninth Circuit. Because the Ninth Circuit encompasses all U.S. ports on the Pacific Ocean, container lessors will be precluded from arresting vessels which ply only the Pacific trade routes, while they may take advantage of maritime lien rights against vessels that call at ports in the U.S. Gulf, East Coast, and Great Lakes. This disparity creates a tension in the general and otherwise uniform U.S. maritime law and encourages forum shopping. It also places lessors whose lessees chiefly trade in the Pacific at a serious disadvantage.

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[6] Maritime Lien Act, 47 U.S.C. §§971-75 (1982) (hereinafter the "Act").

[7] The birth and growth of containerization to its present dominant position in ocean carriage is set out in Quinn, *Ocean Container Leasing and Maritime Liens: An Example of Flexibility in U.S. General Maritime Law*, 18 J. MAR. L. & COM. 1 (1987) (hereinafter "Ocean Container Leasing and Maritime Liens").

[8] Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd., 808 F.2d 697 (9th Cir. 1987)(hereinafter "Char Ching"), at Petitioners' Brief Appendix C (hereinafter "Pet. Brief App.").

The issue in this case surrounds the word "furnishing" as used in the Act.[9] The case under review construed "furnishing" in such a way as to deny a lien for necessaries actually used on an arrested vessel unless the lien claimant had foreknowledge of the specific identity of the vessel prior to its use of the necessary.

Amicus believes it desirable that this Court return to an issue last addressed by this Court sixty-seven years ago in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920) (hereinafter "*Piedmont*"), so as to clarify the law and to make clear the right of container lessors, who furnish containers to ocean carriers, to a maritime lien. This Court's decision in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940) (hereinafter "*Dannebrog*") was the last to consider *any* aspect of suppliers' maritime liens, holding that suppliers did not waive their lien if they looked simultaneously to the credit of the vessel which they had furnished and to the vessel's owner. *Piedmont*, however, was this Court's last decision addressing the question of "furnishing" under the Act.

Amicus urges that this Court grant the requested writ of *certiorari* and reverse the Ninth Circuit.

SUMMARY OF ARGUMENT

This Court should grant petitioners' writ of *certiorari* because the panel majority opinion in the Court of Appeals conflicts with

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[9] Section One of the Maritime Lien Act, as amended, 46 U.S.C. §971 (1982), provides that:

> [a]ny person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

decisions of this Court, with decisions in other courts of appeal, with the language of the Act, and with Congress' intent in drafting the Act. Further, the opinion warrants review because it raises an important question of admiralty law concerning when a maritime lien for necessaries arises (confused by the opinion in *Piedmont*) and because it has made disuniform the developing, but heretofore uniform, maritime law that a maritime lien arises from the breach of a lease of ocean cargo containers.

The opinion conflicts with this Court's decisions and with those of other circuits because it imposes upon maritime suppliers of necessaries a new prerequisite for a maritime lien on vessels which they supply. This Court and other circuits have held that a maritime lien arises where 1) the vessel owner, master, or authorized agent has contracted for necessaries on the credit of the vessel, and 2) the necessaries reach the ship.

This case now declares that there will be no lien unless the supplier furnishes necessaries directly to the ship and, beforehand, has designated each specific ship to receive the necessaries.

The opinion further conflicts with this Court's and other circuits' decisions because it holds that no maritime lien will arise from the furnishing to a vessel of new kinds of necessaries, although maritime law long has recognized that the supply of necessaries supports a maritime lien. Ignoring the celebrated capacity of maritime law to adapt to technological advances, the Court of Appeals rejects a maritime lien in connection with the modern furnishing of oceangoing containers and instead turns the clock back four generations.

The Court of Appeals opinion also runs afoul of the express language of the Maritime Lien Act and Congress' intent in passing the Act. The opinion concludes that Congress intended with the Act to change the existing maritime law and require a supplier to deliver goods or services directly to a prespecified vessel. The legislative history is explicit that Congress did not so intend. Moreover, the opinion, in essence, requires a supplier

to prove that the supplier relied on the credit of a specific vessel, which is directly contrary to the Act.

Finally, the writ presents an appropriate occasion to clarify *Piedmont*, which has served for sixty-seven years only to confuse the important question of the meaning of "furnishing" as used in the Act.

ARGUMENT

I.

The Court of Appeals Decision Conflicts with the Decisions of This Court and of Other Courts of Appeal Because It Denies Maritime Liens to All Suppliers Save Those Who "Furnish" Necessaries Directly to a Prespecified Vessel.

Under this Court's opinions beginning in the early nineteenth century, suppliers who furnish necessaries to a vessel and who meet two requirements have a maritime lien against the vessel. First, the supplier must form a contract with the vessel (through her master, owner, or authorized agents) under which the vessel is hypothecated in exchange for the necessaries.[10] Second, the contract must be executed by the actual use of (or receipt of) the necessaries by the ship.[11] Congress neither changed nor

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[10] The Kalorama, 10 Wall. (77 U.S.) 204, 210 (1869); The Yankee Blade, 19 How. (60 U.S.) 82, 91 (1857); Peyroux v. Howard, 7 Pet. (32 U.S.) 324, 341 (1831); The Aurora, 1 Wheat. (14 U.S.) 96, 102 (1816)(Story, J.); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 635-37 (2D ED. 1975) (hereinafter "GILMORE & BLACK"); A. JENNER, B. CHASE, & J. LOO, 2 BENEDICT ON ADMIRALTY 3-34 to 3-37 (1975 & SUPP. 1986) (hereinafter "BENEDICT ON ADMIRALTY").

[11] *Id.* An enduring doctrine is that admiralty will refuse to grant relief from a breach of an executory contract. *See* GILMORE & BLACK, *supra* note 10 at 635-37; 1 BENEDICT ON ADMIRALTY, *supra* note 10 at 11-12 to 11-16.

intended to change these requirements when it passed the Maritime Lien Act in 1910 or when it amended the Act in 1920[12] and in 1971.[13]

The verb "to furnish" appears in various forms in this Court's pre-Act opinions addressing maritime suppliers' liens,[14] and also appears in the Act.[15] Legislative history does not provide any basis for assigning particular significance to the use of the verb "to furnish" in the Act, but its origin is most likely this Court's prior opinions.

This Court's pre-1910 opinions articulate two purposes for the requirement that suppliers "furnish" necessaries to a vessel in order to have a maritime lien. First, when a supplier "furnished" goods or services to a vessel, that provided some evidence that the supplier had relied on the credit of the vessel. Second, when the necessaries actually reached or were used by the vessel, that served to execute the contract which to that point had remained executory.

With the Act, Congress provided that the supplier was presumed to have a maritime lien on a vessel to which he had furnished necessaries.[16] In eliminating the requirement that a

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[12] Act of June 5, 1920, Ch. 250, §30, Subsec. P, 41 Stat. 1005.

[13] Act of August 10, 1971, Pub. L. 92-79, 85 Stat. 285.

[14] *See* The Kalorama, 10 Wall. (77 U.S.) at 210 ("By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessaries . . .."); The Belfast, 7 Wall. (68 U.S.) 624, 643 (1868)("Material-men, also, who furnish materials or supplies to a vessel . . . have a maritime lien on the vessel . . .."); Peyroux v. Howard, 7 Pet. (32 U.S.) at 341 ("Where repairs have been made, or necessaries furnished . . .."); The General Smith, 4 Wheat. (17 U.S.) 438, 443 (1819)(Story, J.) ("Where repairs have been made, or necessaries furnished . . ..").

[15] "Any person furnishing . . . necessaries, to any vessel . . . shall have a maritime lien on the vessel . . .." 46 U.S.C. §971 (1982). Congress intentionally declined to define the term. *See infra* at 12-14.

[16] The Act provides that, in order to establish a maritime lien, "it shall not be necessary [for the supplier of necessaries] to allege or prove that credit was given to the vessel." 46 U.S.C. §971 (1982).

supplier prove that he had relied on the credit of the ship, the statute by reasonable implication eliminated any requirement that the supplier "furnish" necessaries directly to a preordained vessel. The chief purpose of the "furnishing" requirement since passage of the Act has been to ensure that the necessaries actually reach the vessel in order to execute the contract between the vessel and the supplier.

The Ninth Circuit's requirement that suppliers must deliver necessaries directly to a specific ship in order to have a lien on the ship conflicts with the Fifth Circuit's recent *en banc* decision in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 603 (5th Cir.), *cert. denied*, ____ U.S. ____ (1986), as well as with two other Fifth Circuit decisions, *Stern, Hays & Lang, Inc. v. M/V Nili*, 407 F.2d 549 (5th Cir. 1969)(advertising services), and *Colonial Press of Miami, Inc. v. The Allen's Cay*, 277 F.2d 540 (5th Cir. 1960) (printing services). The requirement further conflicts with a series of older court of appeals and district court decisions from the Fourth, Seventh, and Ninth Circuits, collected at 2 *Benedict on Admiralty*, *supra* note 10 at 3-35 n.18, which support the proposition that:

> [i]f supplies are delivered to the owner pursuant to the contract, it doesn't matter how they get aboard the ship as long as they eventually get there. Thus, it is sufficient if the goods are delivered alongside the ship or other convenient place provided they are ultimately used aboard the ship . . ..

Id.

However, the case under review imposes a reading on the word "furnishing" such as will deny maritime liens to all suppliers save for those who 1) predesignate the specific ship which will receive necessaries, and 2) themselves deliver the necessaries directly to the specific ship.

Leased containers are delivered to vessels through three general types of leases. The trip lease is for a particular number

of containers for a voyage, generally on one ship, from Port A to Port B. The term lease is for a specifically identified group of containers for a set term during which the shipowner can use the containers anywhere it wishes aboard any of its ships. The most important type of lease, which meets the commercial requirements of the shipowners themselves, is the master lease, in which the shipping line agrees to lease a particular (or minimum) number of containers from a lessor who agrees to make those containers available when and where needed around the world.[17] Under a master lease, the lessor has no foreknowledge of or control over which of its containers are to be used on which vessel — but both know that the specific containers are to be used on the shipowner lessee's vessels.

The Ninth Circuit reached its conclusion about the word "furnishing" in reliance upon *dicta* in *Piedmont*,[18] without considering the decisions of this Court prior to *Piedmont*, without examining the necessaries that suppliers furnish to modern vessels or the means of that furnishing, and without considering modern ocean commerce which makes normative both containers as necessaries and the method of their delivery. The Ninth Circuit ascribed unfounded significance to the form of the verb "to furnish" in the Act.[19] The gloss it placed on that grammar constitutes a break from the weight of precedent which this Court should resolve on *certiorari*.

A pointed economic conflict also parallels the legal conflict and calls equally for this Court to grant *certiorari*. In order to protect liens at ports located within the Ninth Circuit, container lessors must now "furnish" their containers, insurers "furnish" their insurance, advertisers "furnish" advertising, and other

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[17] A more extensive description of the types of leases and of the commercial movement of containers in a typical transaction is found in *Ocean Container Leasing and Maritime Liens*, *supra* note 7 at 15-17.

[18] *Amicus* discusses *infra* at 16-18 the Court of Appeals' misreading of *Piedmont*.

[19] *Amicus* discusses *infra* at 12-14 the Act's use of the verb "to furnish."

service suppliers "furnish" services directly to each *predesignated vessel* which is to benefit from those supplies or services. Neither this Court nor any other court of appeals imposes this requirement on suppliers. It represents a significant departure from previous practice and from current practice at ports outside the Ninth Circuit. In ports touching the Pacific, suppliers must now undergo additional expense while opening themselves to the risk of providing unsecured credit for necessaries. The Ninth Circuit has imposed new, impractical, and sometimes impossible operating requirements on lessors and other suppliers.

II.

The Court of Appeals Decision is Contrary to Decisions of this Court and Conflicts with the Decisions of Other Circuits Because It Denies That Liens for New Types of Necessaries May Arise Despite the Fact That Maritime Law Historically Recognizes Maritime Liens for the Supply of Necessaries.

Decisions considering maritime liens frequently quote this Court's opinion in *The Yankee Blade*, 60 U.S. (19 How.) 82, 89 (1857) to the effect that maritime liens are "*stricti juris*" because they are secret liens and, thus, "cannot be extended by construction, analogy, or inference." In *Krauss Brothers Lumber Co. v. Dimon Steamship Corp.*, 290 U.S. 117, 125 (1933), this Court made clear that the Latin aphorism *stricti juris* "does not mean that the right to the [maritime] lien is not to be recognized and upheld, when within accepted supporting principles, merely because the circumstances which call for its recognition are unusual or infrequent." *Krauss Brothers* is this Court's most recent examination of the *stricti juris* principle.[20] The "accepted supporting principles" referred to in *Krauss Brothers* are that, in order for a claim to constitute a maritime lien, it must fall within a *category* of maritime liens which the general maritime

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[20] *See* GILMORE & BLACK, *supra* note 10 at 640-41.

law historically accepts or which the U.S. Maritime Lien Act specifically recognizes.[21]

One of these categories is "necessaries." 46 U.S.C. §971 (1982). Under the rule announced in *Krauss Brothers* and in circuit court opinions over the years, the *stricti juris* principle specifically permits liens to arise from the furnishing of necessaries to a vessel because necessaries are an historically recognized category of maritime lien. *Stricti juris* merely bars new *categories* of liens, such as liens arising from the breach of a partially performed contract of affreightment. *See Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923). Claims for breach of an executory contract fall outside every category of lien which the maritime law traditionally has recognized.

Indeed, this Court's denial of the lien sought in *Piedmont* could be explained on the basis that the contract in *Piedmont* to supply coal both to vessels and to a land-based power plant was an executory contract. The vessel owner already possessed coal from another supplier into which the libellant's coal was mixed, and there was no proof that the additional coal which the libellant supplied—and for which the libellant sought a lien—actually reached the vessels. The Court observed that the defect in the lien claim was not "in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libellant." *Piedmont*, 254 U.S. at 13. One difficulty with *Piedmont* is that its holding can be explained upon a number of differing points—not all of them consistent.

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[21] *See* Atlantic & Gulf Stevedores v. M/V GRAND LOYALTY, 608 F.2d 197, 201 (5th Cir. 1979); United States v. S.S. LUCIE SCHULTE, 343 F.2d 897, 899 (2d Cir. 1965); In re Admiralty Lines, Ltd., 280 F. Supp. 601, 604-05 (E.D. La. 1968), *aff'd.*, Admiralty Lines, Ltd. v. Cooper Stevedoring of Louisiana, Inc., 410 F.2d 398 (5th Cir. 1969); GILMORE & BLACK, *supra* note 10 at 636-40; 2 BENEDICT ON ADMIRALTY, *supra* note 10 at 3-1 to 3-70. For a discussion of types of maritime liens recognized within the category of "necessaries," *see id.* at 3-19 to 3-27.

The panel majority in *Char Ching* recognized and held that containers were "necessaries" to the arrested vessel. *Char Ching*, Pet. Brief App. at B-4 to B-5. However, contrary to *Krauss Brothers* and to decisions in the Fifth and Second Circuits,[22] the panel majority stated that a *stricti juris* analysis precluded liens arising *within* traditionally recognized categories of maritime liens for necessaries, despite changes in technology and in the operations of ocean carriers which made "necessary" things and services unknown to older case law. *Char Ching*, Pet. Brief App. at B-9 to B-11.

This holding will prevent maritime law from keeping pace with commercial realities. As this Court and courts of appeal often have observed, an essential feature of the maritime law is its capacity to grow so as to meet technological advances in maritime commerce. Considering the inherent flexibility of maritime law, the Second Circuit has observed that:

> American admiralty courts have from the earliest times since the founding of the Republic exercised their inherent powers to adjust American general substantive maritime law to new conditions by a process of development and elaboration . . ..

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 447 (2d Cir. 1959); *see United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970); *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-32 (1959); *Saylor v. Taylor*, 77 Fed. 476, 479 (4th Cir. 1896). This Court has emphasized the importance of retaining this flexibility in "a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce." *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 691 (1950).

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[22] Atlantic & Gulf Stevedores v. M/V GRAND LOYALTY, 608 F.2d at 201; United States v. S.S. LUCIE SCHULTE, 343 F.2d at 899.

This Court should review *Char Ching* on *certiorari* because it conflicts with the specific principles of maritime liens, which this Court explained in *Krauss Brothers*, and because *Char Ching* is a pariah within the existing framework of the maritime law.

III.

The Court of Appeals Decision is Contrary to the Maritime Lien Act Because It Presumes That the Act Changed the Concept of "Furnishing" under Maritime Law in the Face of Express Congressional Intent Not to Alter That Law.

Congress had only three purposes when it passed the U.S. Maritime Lien Act in 1910. The first was to do away with the "home port doctrine."[23] The second was to eliminate the doctrine that, when a vessel owner (as distinct from the captain) contracted for necessaries, the supplier was presumed to rely on the credit of the owner and not on that of the vessel.[24] The third was to provide a single federal standard to override numerous state statutes which at the time provided "maritime" liens for a variety of goods and services supplied to a vessel within the jurisdiction of that state. *Piedmont*, 254 U.S. at 11. The committee reports of both the House and the Senate establish that Congress did not intend to make any other changes in the general principles of the existing law of maritime liens.[25]

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[23] The doctrine, announced in The General Smith, 17 U.S. (4 Wheat.) 438 (1819), provided that "when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises . . .." Piedmont, 254 U.S. at 11.

[24] This was related to the "home port doctrine." *See* Piedmont, 254 U.S. at 11.

[25] S. REP. NO. 831, 61st Cong., 2d Sess.; H.R. REP. NO. 272, 61st Cong., 2d Sess. This Court has twice observed that Congress expressly intended that the Maritime Lien Act not change the existing maritime law save for

The majority of the panel in *Char Ching* brushed aside the express Congressional intent and, instead, imputed a Congressional intent by resort to the grammar of the Act, noting that Congress used the verb "to furnish" as a gerund and not as a verb.[26] The panel majority speculated that, because Congress used "to furnish" in that fashion, Congress must thereby have intended to require "active forethought or advance identification of particular vessels in relation to 'necessaries' supplied." *Char Ching*, Pet. Brief App. at B-7.

However, the first commentator on the Act explained that:

> [t]he Act of Congress is perhaps open to criticism for not defining the meaning of the term "furnish." That an explicit definition of this word would be beneficial may be admitted, for there is at present a conflict of authority on the subject. . . . [T]he difficulty of determining just where the line should be drawn led to the omission of any definition in the law, and the courts, as heretofore, must decide upon the facts in each particular case.

Smith, *The New Federal Statute Relating to Liens on Vessels*, 24 Harv. L. Rev. 182, 200-01 (1911)(*cited with approval in Piedmont*, 254 U.S. at 11 n.3). The commentator, Mr. Fitz-Henry Smith, Jr., was a member of the Executive Committee of the Maritime Law Association of the United States (MLA) for three periods between 1911 and 1933, and was one of the three members of the MLA committee which drafted the Maritime

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the three ways discussed *supra*. W. A. Marshall & Co., Inc. v. The President Arthur, 279 U.S. 564, 568 (1929); Piedmont, 254 U.S. at 11. *See* GILMORE & BLACK, *supra* note 10 at 663; 2 BENEDICT ON ADMIRALTY, *supra* note 10 at 3-23 to 3-27.

[26] Char Ching, Pet. Brief App. at B-7. A computerized database search of federal and state court opinions as well as manual research reveals that the Court of Appeals decision is the first in the seventy-seven-year history of the Maritime Lien Act to draw significance from Congress' grammatical use in the Act of the verb "to furnish."

Lien Act. Congress adopted the MLA draft without material amendment. *See id.* at 182. Therefore, according to Mr. Smith (who, because of his work with the MLA drafting committee, was tantamount to being one of the drafters of the Act), Congress specifically omitted any definition of "furnishing."

Neither this Court nor any other circuit court has ever required the methodology of "furnishing" imposed by the Ninth Circuit. *Certiorari* is the only sure remedy for this anomaly.

IV.

The Court of Appeals Decision is Contrary to the Maritime Lien Act Because It Requires the Supplier of Necessaries to Prove Reliance on the Credit of the Vessel, When the Act States Expressly that the Supplier Need Not Make Such Proof.

The Maritime Lien Act states expressly that "[any] person furnishing . . . necessaries . . . to any vessel . . . shall have a maritime lien on the vessel . . . and *it shall not be necessary to allege or prove that credit was given to the vessel.*" 46 U.S.C. §971 (1982) (emphasis added). Although this language establishes a strong presumption that a maritime lien has arisen when a vessel receives or utilizes necessaries, Congress' latest amendment to the Act, in 1971, further strengthened the presumption.[27] The 1971 amendment eliminated the requirement that suppliers investigate, prior to supplying a chartered ship, whether the charter party contained a "no lien" clause. Under the amendment, a "no lien" clause will bar a lien only where

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[27] Congress has only amended the Act on one other occasion, in 1920, changing its original provision for liens to arise from the furnishing of "repairs, supplies, or other necessaries, including the use of dry dock or marine railway," to provide for maritime liens to arise from the furnishing of "repairs, supplies, towage, use of dry dock or marine railway, or other necessaries . . .." GILMORE & BLACK, *supra* note 10 at 657. Congress intended to broaden the "furnishing" requirement with that amendment.

a supplier has actual knowledge of the clause prior to supplying the chartered vessel. *See* 2 *Benedict on Admiralty*, *supra* note 10 at 3-41 to 3-42; *Gilmore & Black*, *supra* note 10 at 669-70.

The purpose of the Act, and of both the 1920 and 1971 amendments, was to expand the scope of maritime liens granted to suppliers of necessaries.[28] It was Congress' belief in 1971 that it was inequitable that suppliers be required to prove, each and every time they supplied necessaries, that a vessel's master, owner, or authorized agent had hypothecated the ship in exchange for the specific supply of necessaries.[29] The Act as amended thus places squarely on the shipowner the burden of disproving the lien. *Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91, 93 (1st Cir. 1982); *accord, Gulf Trading & Transportation Co. v. Vessel Hoegh Shield*, 658 F.2d 363 (5th Cir.), *cert. denied*, 457 U.S. 1119 (1981); *see* Ray, *Maritime Contract Liens*, 47 Tul. L. Rev. 587, 597-99 (1973).

Char Ching ignores that express provision of the Act and substitutes a conflicting requirement that, in order to have a maritime lien for necessaries, a container lessor must demonstrate that he furnished the necessaries on the specific credit of the predesignated vessel.

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[28] The Ninth Circuit itself recognized this in Farwest Steel Corp. v. Barge Sea-Span 241, 769 F.2d 620, 623 (9th Cir. 1985) but apparently ignored this recognition two years later in Char Ching. For further discussion of the purpose of the 1971 amendments to the Act, *see* GILMORE & BLACK, *supra* note 10 at 652-53; 669-70; *see also* Gulf Oil Trading Co. v. M/V CARIBE MAR, 757 F.2d 743, 747-49 (5th Cir. 1985); Atlantic & Gulf Stevedores v. M/V GRAND LOYALTY, 608 F.2d at 201-02; Lake Union Drydock Co. v. V/N Polar Viking, 446 F. Supp. 1286, 1289-90 (W.D. Wash. 1978); Nacirema Operating Co. v. S.S. Al Kulsum, 407 F. Supp. 1222, 1225-26 (S.D.N.Y. 1975).

[29] The House Committee on Merchant Marine and Fisheries concluded that it would be more equitable to make the owner, as opposed to the supplier, bear any loss arising out of the furnishing of necessaries to a ship, since:

> [a]s a practical matter, the owner can more easily protect himself by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back to sea.

H.R. REP. NO. 92-340, 92d Cong., 1st Sess. 1, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1363.

V.

The Court of Appeals Decision Raises the Important Question of When a Maritime Lien for Necessaries Arises, a Question Which *Piedmont* Confused and Which This Court Should Now Clarify on *Certiorari*.

Piedmont, the only decision of this Court to consider the "furnishing" requirement of the Act, is replete with contrary dicta. The resulting confusion during the opinion's sixty-seven-year life is illustrated by a series of cases which have viewed *Piedmont* to stand for conflicting propositions,[30] as well as by the reliance by the *Char Ching* majority on one set of *Piedmont* dicta, and reliance by the dissent on another set of dicta of equal rank.[31] Indeed, the confusion surrounding *Piedmont* apparently led the *Char Ching* majority to misread *Dannebrog*, this Court's only description of *Piedmont*. However, *Dannebrog* supports

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[30] *See* Jeffrey v. Henderson Brothers, 193 F.2d 589 (4th Cir. 1951); Bankers Trust v. Hudson River Day Line, 93 F.2d 457 (2d Cir. 1937); Kopac Int'l v. Bold Venture, 1987 A.M.C. 192, 194 (W.D. Wash. 1986); Bellingham Nat'l Bank v. Oil Screw Pacific Horizon, 587 F. Supp. 26, 28-29 (W.D. Wash. 1984); Walter E. Heller & Co. v. M/V Mr. Ed, 273 F. Supp. 926, 928 (E.D. La. 1967); Brock v. S.S. Southampton, 231 F. Supp. 280, 282 (D. Ore. 1964); Davis v. U.S. Gas Screw Nola Dare, 125 F. Supp. 677, 678 (E.D.N.C. 1954); American Stevedores, Inc. v. The Trajan, 118 F. Supp. 608, 610 (E.D.N.Y. 1954); The American Eagle, 30 F.2d 293, 295 (D. Del. 1929).

[31] The dissent quoted the following from *Piedmont* to support the lessor's maritime lien:

> [T]he fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the [Maritime Lien Act] for supplies furnished to the others, even if the supplies are furnished to all upon the orders of the owner under a single contract . . . each vessel so receiving supplies may be made liable for the supplies furnished to it.

Piedmont, 254 U.S. at 10-11, quoted in Char Ching (dissent), Pet. Brief App. at B-13. In contrast, the majority characterized Piedmont as follows in holding that no lien existed:

the concept of a maritime lien for container lessors. This Court in *Dannebrog*, 310 U.S. at 276-77, explained that *Piedmont* denied a lien to the coal supplier libellants because 1) the libellants had no understanding, either at the time that the contract was made or at the time that the coal was delivered, that any part of it was for any particular vessel *or even for vessels composing a fleet*, and 2) the parties clearly understood that the defendant shipowner would use the coal in part to fuel its shoreside power plant. Here, the lessors—as well as the ocean carrier—always understood that the lessors furnished containers for the lessee's fleet of six identifiable vessels. The lessors kept detailed records of which containers the shipping line withdrew from the lessors' depots, and the lessors can prove exactly which containers were used aboard the arrested vessel.

The leading modern commentators on admiralty have observed of *Piedmont* that:

> [a]s was his habit, Justice Brandeis in the course of a moderately long opinion multiplied the facts that might be considered significant . . .. By the time he had finished, not even the purest legal genius could have declared which of these multiple facts, or which combination of them, had resulted in the denial of lien. Consequently the case, in its specific context of supplies furnished to a fleet of ships, has ever since proved slippery precedent to the counsel and lower court judges who have wrestled with it. The *Piedmont* case is all things to all men and is regularly cited on both sides of every case in which it is relevant: since some of Justice Brandeis' facts are always present, it is an authority for shipowners' counsel for denial of the lien; since all of them are never present, it is equally an authority for the suppliers' counsel in favor of the lien.

In *Piedmont*, the Supreme Court denied maritime liens sought against vessels that had received coal which had been sold to the vessels' owner on credit. The defect was not "in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libellant."

Char Ching, Pet. Brief App. at B-8, quoting Piedmont, 254 U.S. at 13.

Gilmore & Black, supra note 10 at 661.

This Court on *certiorari* should clarify *Piedmont* in respect of the "furnishing" requirement of the Act, giving due regard to the developments in the maritime industry since 1920 and to the importance of containerization to modern ocean commerce. The meaning of this "furnishing" requirement is an important question of federal law because "furnishing" is the operative term of the Act. Because the question on *certiorari* focuses only on the meaning of that word in the Act, this case presents a particularly appropriate opportunity to clarify a term which has remained cloudy for almost seventy years.

VI.

The Court of Appeals Decision Makes Disuniform the Previously Uniform Maritime Law That a Maritime Lien Will Arise for the Breach of a Container Lease.

Each of the three published district court decisions which has considered the question has recognized a maritime lien for the breach of a container lease.[32] No case known to *Amicus*, save for the panel majority opinion in *Char Ching*, has ever held against the lien.

The general maritime law of the United States is a single, uniform body of law which must be *kept* uniform in order to assure the smooth operation of the maritime industry. The need for uniformity is the central reason for the creation of separate

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[32] Flexi-Van Leasing, Inc. v. M/V C.C. San Francisco, 628 F. Supp. 1077 (C.D. Cal. 1985) (the trial court decision overturned by Char Ching, Pet. Brief App. D); Nautilus Leasing Services v. M/V COSMOS, 1983 A.M.C. 1483 (S.D.N.Y. 1983) (not otherwise reported); and Transamerica ICS, Inc. v. M/V PAN-ATLANTIC, 1984 A.M.C. 489 (S.D. Fla. 1983) (not otherwise reported). Several unpublished decisions of other district courts, cited at *Ocean Container Leasing and Maritime Liens, supra* note 7 at n.59, have also accorded maritime lien status to container lessors.

admiralty jurisdiction under the Constitution and the reason that the general maritime law is binding on every court (including state courts) in the United States.[33] It is also, of course, important that the construction of a significant federal statute, such as the Act, not vary from court to court. This Court, therefore, should grant the writ so as to restore uniformity to maritime law and to the construction of the Act.

CONCLUSION

The decision below conflicts with decisions of this Court and with decisions of other courts of appeal. It makes disuniform what had been the uniform U.S. maritime law that a maritime lien arises as the result of the breach of a container lease. The decision raises the important federal law question of when a maritime lien for the "furnishing" of necessaries arises—a question left in confusion by *Piedmont*—which this Court should take the opportunity to clarify.

Amicus, therefore, requests that this Court grant the Petition for a Writ of *Certiorari* and overturn the ruling below.

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[33] *See* Detroit Trust v. The Thomas Barlum, 293 U.S. 21, 42-44 (1934); Dravo Corp. v. Maxin, 545 F.2d 374, 377-79 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

Exhibit A

Members of the
Institute of International Container Lessors, Ltd.

CLOU CONTAINER LEASING GmbH
Hamburg, Federal Republic of Germany

FLEXI-VAN LEASING, INC.
New York, New York

GELCO CTI CONTAINER SERVICES, INC.
Eden Prairie, Minnesota

INTERPOOL LIMITED
New York, New York

ITEL CONTAINERS INTERNATIONAL CORPORATION
San Francisco, California

NAUTILUS LEASING SERVICES, INC.
San Francisco, California

SEA CONTAINERS, LTD.
London, England

TEXTAINER INCORPORATED
New Malden, Surrey, England

TRANSAMERICA ICS, INC.
White Plains, New York

TRANS OCEAN LEASING CORPORATION
San Bruno, California

TRITON CONTAINER INTERNATIONAL, LTD.
San Francisco, California

XTRA CORPORATION
Boston, Massachusetts

Supreme Court, U.S.
FILED
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2009

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ITEL CONTAINERS INTERNATIONAL CORP;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

vs.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 86-2009

In the Supreme Court

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OCTOBER TERM, 1986

ITEL CONTAINERS INTERNATIONAL CORP;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

VS.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully call to the Supreme Court's attention new and relevant case law supporting their petition for issuance of a writ of certiorari to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit, issued in this proceeding on January 20, 1987 (as amended February 5, 1987).[1]

[1] Petitioners refer the Court to Appendix A of their Petition For A Writ of Certiorari for a list of all their parent companies, non-wholly owned subsidiaries, and affiliates.

I

RECENT CASE LAW FURTHER DEMONSTRATES THE CONFLICT BETWEEN THE OTHER CIRCUITS' AND THE NINTH CIRCUIT'S INTERPRETATION OF THE "FURNISHING" REQUIREMENT OF 46 U.S.C. § 971

The recent decision of the Hon. Robert L. Carter, United States District Court Judge for the Southern District of New York, in the case of *Itel Containers Int'l. Corp. v. Atlanttrafik Express Service, Ltd.*, ____ F. Supp. ____ (S.D.N.Y., Aug 18, 1987) (Docket No. 86 Civ. 1313 (RLC)), graphically demonstrates the conflict between the courts of other circuits and the Ninth Circuit regarding the interpretation of the "furnishing" requirement of 46 U.S.C. § 971. The *Itel Containers Int'l Corp.* case has been submitted by Judge Carter for publication, and a true and correct copy of the decision is attached as Appendix "A" to this Supplemental Brief.

The *Itel Containers Int'l. Corp.* case pointedly emphasizes the problem that the enforceability of a container lessor's claimed maritime lien depends upon the fortuity of where a vessel happens to be when the lien is asserted.

CONCLUSION

Petitioners request that the Supreme Court consider this additional recent case law and grant their Petition for a Writ of Certiorari.

Dated: September 11, 1987

Respectfully submitted,

GRAHAM & JAMES
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(Appendix "A" Follows)

Appendix A*

United States District Court
Southern District of New York

86 Civ. 1313 (RLC)

Itel Containers International Corporation, et al.,
Plaintiffs,

against

Atlanttrafik Express Service, Ltd., et al.,
Defendants.

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* No mention was made in the text of this decision as to where footnote 5 is to be referenced.

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Carter, District Judge

OPINION

These consolidated actions arise from the default by defendant Atlanttrafik Express Service, Ltd. ("AES") on leases it entered into for marine cargo containers and chassis. In its Second Amended Complaint, plaintiff Flexi-Van Leasing, Inc. ("Flexi-Van"), a lessor of the equipment, asserts, *inter alia*, a claim *in rem* against the former vessels of the now-liquidated AES based on a maritime lien to recover unpaid charges on the equipment.[1] The present vessel owners—intervenors Strider 4 Inc., Strider 1 Ltd., Nagara Ltd., Nagara Tam Ltd., and Contender 1 Ltd.—now move for partial summary judgment to dismiss Flexi-Van's *in rem* action to the extent that it seeks a maritime lien for unpaid chassis and container charges other than those for per diem rents on containers for periods during which the containers were on board a vessel. The motion is filed pursuant to Rule 56, F.R.Civ.P.[2]

Whether maritime liens may be asserted for charges owing on chassis and containers for periods they were not used on board ship is apparently an issue of first impression not only in this circuit but in any federal court. In light of the growing importance this equipment now plays in modern cargo shipment, the issue before the court is thus one of some moment not only to the litigants but to the shipping industry as a whole. As a result, before addressing the competing claims of the parties, it is appropriate to review not only the applicable law but what has been called the "container revolution." Simon, *The Law of Shipping Containers*, 5 J. Mar. L. & Com. 507, 507 (1974).

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[1] *See* Second Amended Complaint of Flexi-Van Leasing, Inc. ¶¶ 11-20 ("First Claim for Relief (In rem)").

[2] Rule 56(c), F.R.Civ.P. provides in pertinent part that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id. See Jack Anderson v. Liberty Lobby, Inc., ____ U.S. ___, ___ 106 S.Ct. 2505, 2509-10 (1986).

BACKGROUND

Marine containers are large metal boxes used to transport cargo. They are usually 20 or 40 feet long, 8 feet wide, and 8 feet high. Chassis are frames and wheels designed to move containers to and from ports, in and around a port or dock area, and even, in the case of specially outfitted roll-on, roll-off vessels (so-called "ro-ro" vessels), onto the vessel. *See* Simon, *supra,* at 510.

Containerization has become increasingly popular because it offers a far more efficient means of transporting freight than the loose or "break-bulk" shipping of the past, when large quantities of smaller packages would be delivered to the pier by truck or rail, individually unloaded by hand and moved and stacked in a storage area before finally being loaded on board ship for a voyage that would end in a similarly cumbersome and labor-intensive unloading process. Simon, *supra,* at 510-11.

With containerization, a single reusable container holding many smaller packages can be delivered to the pier, put aside until the ship is ready, and loaded and unloaded, all without costly movement of the individual packages. The labor savings are substantial, damage to cargo is reduced, and ships and their crew spend less idle time in port. Simon, *supra,* at 512. As the United States Court of Appeals for the Second Circuit has noted, containerization has so "revolutionized maritime cargo-handling techniques" that it has been "[c]haracterized by one commentator as '[o]ne of the most important technilogical developments in the transportation of goods by sea since steam replaced sail.'" *CTI-Container Leasing Corp. v. Oceanic Operations Corp.,* 682 F.2d 377, 380 (2d Cir. 1982) (quoting Simon, *supra,* at 507).

Flexi-Van is one of the world's largest container lessors and the largest lessor of chassis in the world. In this action it seeks to recover $2,483,387.64 for AES's default on the lease arrangements. The damages claimed are for per diem rent, repair,

insurance, drop-off charges,[3] direct interchange charges,[4] handling charges, charges for lost equipment, and accelerated rent. Second Amended Complaint, ¶¶ 11-20. The vessel owners do not dispute that these charges were never paid, only that the vessels may be subject to maritime liens as a result.

DISCUSSION

The question of whether Flexi-Van may assert a maritime lien on AES's former vessels turns on the Federal Maritime Lien Act, 46 U.S.C. § 971 *et seq.* ("the Act"). Under the Act, a federal maritime lien creates "a special property right in the vessel, arising in favor of the creditor by operation of law as security for a debt or claim. The lien arises when the debt arises, and grants the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds." *Equilease Corp. v. M/V Sampson,* 793 F.2d 598, 602 (5th Cir. 1986) *(en banc), cert. denied,* ____ U.S. ____, 107 S. Ct. 570 (1987). It is "a lien on the vessel," and "has been held to follow the vessel even after it has been sold to an innocent purchaser." *Id.* It serves the "dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away." *Id.; see also* G. Gilmore & C. Black, *The Law of Admiralty,* § 9-34 at 657 (2d ed. (1975).

Section 971 of the Act provides that:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

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[3] Like car rental agencies, lessors like Flexi-Van require lessees to return equipment to particular ports or face additional "drop-off" or repositioning charges.

[4] This charge amounts to an administrative fee assessed when different shipping lines "interchange" equipment among themselves.

The vessel owners contend that except for the period during which they are used on board ship, neither chassis nor containers are "necessaries" under the Act. In addition, they argue that the containers and chassis in this case were not "furnished to" the vessels within the meaning of the statute.

Under § 971, "the word 'necessaries' . . . should be broadly interpreted: 'The test is whether the supplies or services furnished are reasonably needed in the ship's business.' " *Nautilus Leasing Services, Inc. v. M/V Cosmos,* 1983 A.M.C. 1483, 1483 (S.D.N.Y. 1983) (MacMahon, J.) (citation omitted). The term "includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Necessaries are the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged. . . . 'It is the present, apparent want of the vessel, *not the character of the thing supplied,* which makes it a necessary.' " *Equilease, supra,* 793 F.2d at 603 (quoting 2 *Benedict on Admiralty* § 34 (7th ed. 1984) (emphasis added); *see also* G. Gilmore & C. Black, *supra,* § 9-34 at 657-58 & n.185 (citing cases.)

In light of the expansive gloss surrounding "necessaries," it not surprising that all courts which have considered whether containers are necessaries have answered in the affirmative. *Foss Launch*

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[5] *Nautilus Leasing Services, Inc. v. M/V Cosmos,* 1983 A.M.C. 1483 (S.D.N.Y. 1983) (MacMahon, J.) and *Transamerica ICS, Inc. v. M/V Panatlantic,* 1984 A.M.C. 489 (S.D. Fla. 1983) make no mention of to what use the containers at issue were put. The court in *Flexi-Van Leasing, Inc. v. M/V C.C. San Francisco,* 628 F. Supp. 1077, 1080 (C.D. Cal. 1985), *aff'd in relevant part, rev'd on other grounds sub nom. Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.,* 808 F.2d 697 (9th Cir. 1987) held that the maritime lien encompassed all periods the "containers served as the functional equivalent of the hold of the [ship], *including incidental land use." Flexi-Van, supra,* 628 F. Supp. at 1080. The circuit court, however, seemed to read the district court's holding narrowly. *Foss Launch, supra,* 808 F.2d at 700 ("We note without deciding that proof of excess leasing of containers in relation to the capacities of a single vessel or fleet of vessels might undermine a materialman's claim to having furnished 'necessary' items to a vessel").

& Tug Co. v. Char Ching Shipping U.S.A., Ltd., 808 F.2d 697, 700 (9th Cir. 1987); *Nautilus, supra*, 1983 A.M.C. at 1483; *Transamerica ICS, Inc. v. M/V Panatlantic*, 1984 A.M.C. 489, 490 (S.D. Fla. 1983). The vessel owners do not challenge the validity of these holdings, but seek to distinguish them on the ground that the liens at issue in those cases were only valid to the extent that the containers were in use on board ship. The liens sought in this case, they say, include charges for periods the chassis and containers were not used on board ship. *See* Intervenors' Reply Memorandum of Law at 7-19 *passim*.

It is unclear to what use the containers in the previously reported cases were put.[6] It is clear, however, that the vessel owners' analysis misses the mark. As noted, it is the need of the vessel, "*not the character of the thing supplied*, which makes it a necessary." *Equilease, supra*, 793 F.2d at 603 (quoting Benedict on Admiralty, *supra*, § 34) (emphasis added). Thus, as far back as 1931 this court, upholding a maritime lien for unpaid taxi fare necessary to bring provisions to a crew, held that the fact that "the services were performed on land . . . would not make them non-maritime." *The Artemis*, 53 F.2d 672, 680 (S.D.N.Y. 1931) (Woolsey, J.) (citing, *inter alia, The Susquehanna*, 3 F.2d 1014 (D. Mass 1923) (lien attached when health officials required that passengers' baggage be fumigated on land)); *see also Equilease, supra*, 793 F.2d at 604 (insurance is a necessary because it "is something that every vessel today needs just to carry on its normal business").

Containers and chassis, similarly, are necessary to the operation of a modern container ship not only when they are on board ship but also when they are being used to transport or store freight around the port area, or to load it on board. In this latter sense, they are no different from cranes or stevedores, both of which are incontestably "necessaries" under § 971. As Judge Knapp noted

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[6] Also suitable for resolution at trial is the vessel owners' contention that Flexi-Van relied on the credit-worthiness of AES, rather than their security interest in the vessels themselves, when they entered into the leases. *See Equilease, supra*, 793 F.2d at 605-06. At this stage, that issue remains a contested issue of material fact.

in *Atlantic & Gulf Stevedores, Inc. v. M.V. Rosa Roth,* 587 F. Supp. 1033, 1035 (S.D.N.Y. 1984) (Knapp, J.), where the defendant vessel resisted imposition of a lien on unpaid stevedore services: "[T]he vessel was chartered out to carry freight; it needs no great expertise in admiralty to know that a vessel cannot fulfill that purpose without loading and unloading services such as those provided by plaintiff." *See also TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta,* 696 F.2d 1135, 1138 (5th Cir. 1983) (lien on crane); *Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty,* 608 F.2d 197, 199 (5th Cir. 1979) (lien on "shore crane").

This does not mean liens may attach only for those periods when a container or chassis was actively loading or unloading a vessel. Accordingly to Flexi-Van—and this is not disputed by the vessel owners—a shipping line or vessel needs as much as three times the number of containers the ship(s) can carry: As Flexi-Van explains it, to operate at maximum efficiency, there must be a ship's capacity of containers not only on board a ship, but also at the ports of embarkation and debarkation to be loaded aboard when the ship makes its call. *See* Foley Affidavit, ¶ 6. The situation is analogous to that in *Rosa Roth,* where Judge Knapp held that a maritime lien could properly be asserted for unpaid stevedore wages, including "non-work time" charges. Judge Knapp reasoned that without promise of payment for the non-work time, the stevedores would not have performed the job. Thus, while those charges "were not strictly necessary to enable the vessel to carry out its function," they were "necessaries" within § 971. *Rosa Roth, supra,* 587 F. Supp. at 1035. So here, container and chassis charges are "necessaries" even for the periods when the equipment was idle.

The vessel owners are persuasive, however, in their argument that a maritime lien would be inappropriate for container or chassis charges for periods when the equipment was used for a wholly non-maritime purpose, for example in train or air transport. At this stage of the proceedings, however, with nothing in the record to suggest that the equipment was used in anything but maritime commerce, this argument has little effect on the disposition of the instant motion. To see this issue in its proper context, it is useful to refer to the Second Circuit's opinion in *CTI-Container*

Leasing, supra, 682 F.2d 377. There the issue was whether a container lease was a maritime contract such that it invoked the court's admiralty jurisdiction. The court rejected the defendant's argument that because the containers could have been used in a non-maritime form of commerce the equipment lacked a sufficient maritime flavor, noting that the lease itself as well as the identity of the parties (the defendant was a shipping agent) "point to shipping as the envisioned mode of use of [the] containers." *Id.* at 381. So here, without further evidence that the equipment was used in anything but maritime commerce, circumscribing the liens sought by Flexi-Van would be inappropriate. If the vessel owners have evidence that the equipment was used outside of maritime commerce they should present it at trial.[7]

The vessel owners also argue that the leased containers and chassis were not "furnished" to the vessels under the Act because Flexi-Van leased the equipment to the entire AES fleet rather than to specific vessels. The court finds that this contention runs contrary to the prevailing authority, reads the Act far too narrowly, and if followed would result in an outcome contrary to the statute's stated purpose of fostering marine commerce.

Since at least 1940, it has been clear that a lien may attach when services or supplies are provided to a fleet of vessels so long as title to any goods is not diverted to an intermediary. *See Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.,* 310 U.S. 268, 277 (1940). Thus, "for purposes of creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container [or chassis] be . . . earmarked for a particular vessel." *Transamerica, supra,* 1984 A.M.C. at 490.

A broad reading of the word "furnishing" seems especially ineluctable in light of the 1971 amendments to the Act, which

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[7] The vessel owners raise a number of other points, all but one of which are entirely without merit and are summarily denied. The exception is the owner's contention that Flexi-Van must mitigate its damages by reducing any recovery on the accelerated rent provisions by any rental income it earned on any repossessed equipment during the remainder of the lease terms. On this matter, they are entirely correct, and any damages Flexi-Van recovers will be adjusted accordingly.

"mandate a more liberal application than that which existed" previously. *M/V Grand Loyalty, supra,* 608 F.2d at 201; *Payne v. SS Tropic Breeze,* 423 F.2d 236 (1st Cir.), *cert. denied,* 400 U.S. 964 (1970); *Transamerica, supra,* 1984 A.M.C. at 490; *see also* H.R. Rep. No. 92-340, 92d Cong., 1st Sess. 1, *reprinted in* 1971 U.S. Code Cong. & Ad. News 1363-65. As a result, "[w]e find no persuasive reason to read the term 'furnishing' so narrowly . . . " *Equilease, supra,* 793 F.2d at 603.

The vessel owners' position seems especially unconvincing in light of the realities of container and chassis usage. The advantage this equipment offers is its transferability. If the equipment had to be earmarked for a particular vessel and (presumably) used only by that vessel, that advantage would be lost. As the court said in *Equilease,* "[t]he statute was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation." *Equilease, supra,* 793 F.2d at 603.

Indeed, the vessel owners' argument on this score would barely warrant comment were it not for the Ninth Circuit's decision earlier this year in *Foss Launch, supra,* 808 F.2d 697. In *Foss Launch,* a majority of the panel, over a vigorous dissent, held that containers must be furnished to particular vessels rather than an entire fleet for a maritime lien to attach. *Id.* at 703. Although the *Foss Launch* holding is of course not binding on this court, like any appellate decision it is worthy of attention to gain insight into the issues presented.

The *Foss Launch* holding relies on an exegegis of the text of § 971 and on the Supreme Court's 1920 decision in *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1 (1920). The *Foss Launch* court's textual analysis is better read than explained:

> Stripped to its essentials, the statute states that "[a]ny person furnishing . . . necessaries . . . to any vessel . . ." We note initially that the verb "to furnish" as found in the statute appears in the form of the active and not the passive voice. For example, the statute could have been drafted to state that "necessaries that *are furnished* to any vessel" can

> support a maritime lien. In such circumstance [sic], it would have been possible for even the fortuitous application or use of necessaries by a vessel to create a valid maritime lien against a vessel. In creating a preferred class of secured creditors, Congress chose not to draft the Act in the passive voice and we think the correct inference is that Congress intended "furnishing" to require active forethought or advance identification of particular vessels in relation to "necessaries" supplied.

808 F.2d at 701 (emphasis in original).

With all due respect to the Ninth Circuit, the court finds this reasoning singularly unpersuasive. No matter what grammatical terms one affixes to these constructions, the court discerns no relevant distinction between them. Without support from the legislative history, there is simply no reason to believe that Congress's use of "[a]ny person furnishing . . . necessaries" rather than "necessaries that are furnished" indicates anything about Congress's intentions with respect to the vessel-specific nature of maritime liens.

As noted above, *Foss Launch* also heavily relies on the Supreme Court's sixty-seven-year-old decision in *Piedmont*. A Supreme Court decision, of course, is always binding on this court. The well-recognized problem with *Piedmont*, however, is not whether to follow it, but how to follow it. As Professors Gilmore and Black have pointed out in their seminal treatise on admiralty law, *Piedmont* involves such a multiplicity of facts and such an absence of guidance as to which facts are relevant, that "not even the purest legal genius could have declared" what the case turns on. As a result, "[t]he Piedmont case is all things to all men and is regularly cited on both sides of every case in which it is relevant. . . ." G. Gilmore & C. Black, *supra*, § 9-36 at 661.

In *Piedmont*, the Supreme court denied a lien sought by a coal dealer against an oil company which owned a fleet of fishing steamers. It is unclear, however, on which potentially relevant fact the decision hinged: The coal company did not directly deliver coal to any vessel; the bill was sent to the oil company; the coal remained in the oil company's bins for long periods before

delivery to particular ships; some of the coal was used by the factory rather than the vessels; and there was no agreement that the coal was to be used by any particular vessel or vessels.

In *Foss Launch, Piedmont* is a principal feature of both Judge Goodwin's majority opinion and Judge Anderson's dissent. Judge Goodwin cites the case as holding that a lien may attach only if a particular vessel is cited in the contract. 808 F.2d at 702. Judge Anderson argues that the case turns on the fact that the coal was delivered to the factory and there was no way to tell what maritime use, if any, was contemplated. *Id.* at 704.

It is the opinion of this court that *Piedmont* may be read to support either position. As a result, finding that all other indications point to an expansive reading of "furnishing," the court holds that "furnishing" in § 971 may support a lien on a fleet of vessels.

Accordingly, the vessel owners' motion for partial summary judgment is denied.

IT IS SO ORDERED.

Dated: New York, New York
August 18, 1987

/s/ ROBERT L. CARTER
Robert L. Carter
U.S.D.J.